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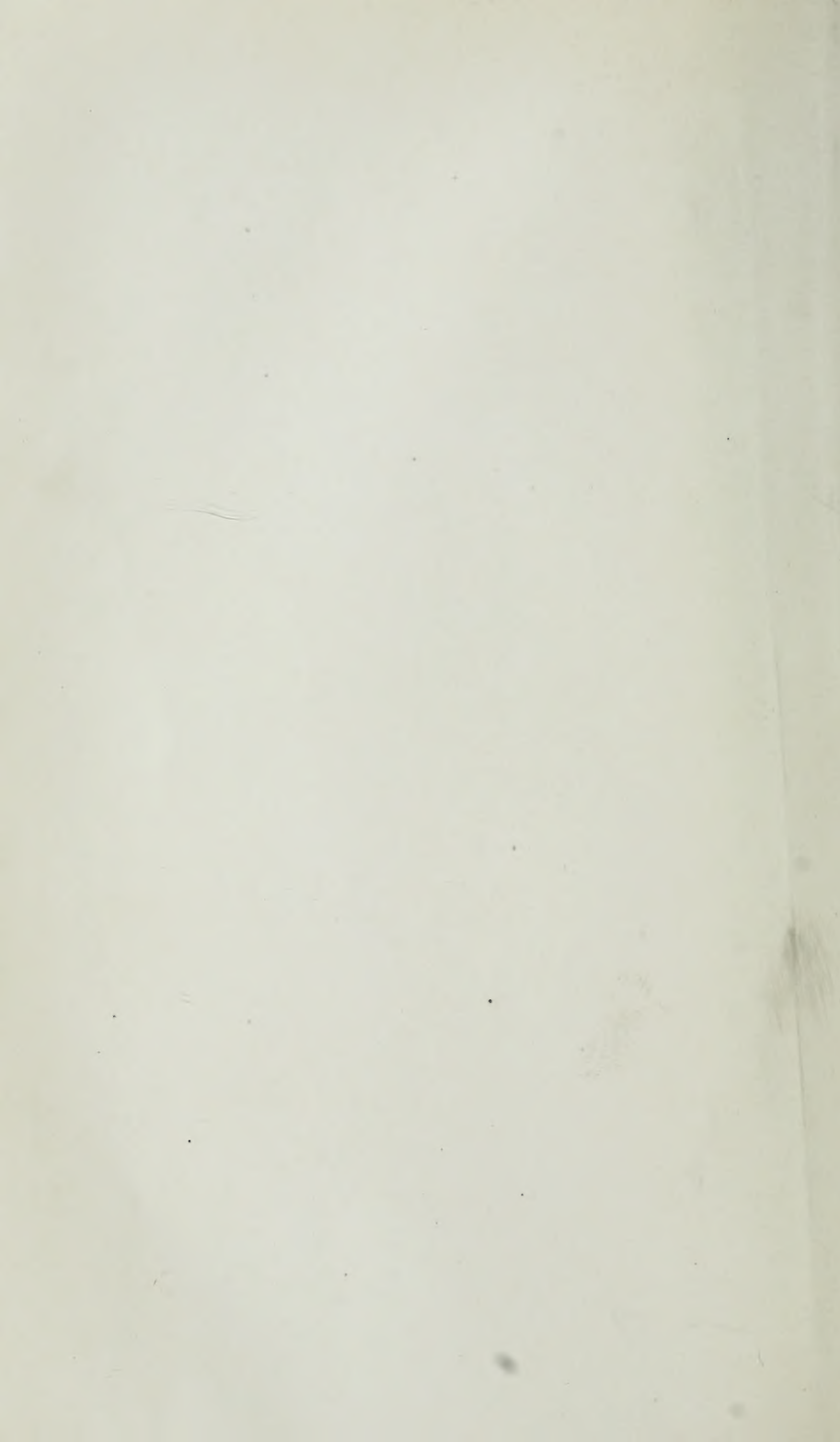
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IN THE

United States

Circuit Court of Appeals

NINTH CIRCUIT

TANANA TRADING COM-
PANY, a corporation,

Plaintiff in Error,

vs.

NORTH AMERICAN TRADING
& TRANSPORTATION COM-
PANY, a corporation,

Defendants in Error.

No. 2172

BRIEF OF DEFENDANT IN ERROR

FREDERICK BAUSMAN,
R. P. OLDHAM,
R. C. GOODALE,

Attorneys for Defendant in Error.

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Crocker Building, Of Counsel.
San Francisco, Cal.


Press of Pliny L. Allen, Seattle, Washington

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STATEMENT.

The Tanana Trading Company was organized in January, 1905. There are seven stockholders; Bain, Struthers, Bishoprick, Blair, Cameron, and Livingston. There were a thousand shares but only four hundred twenty-three shares issued. Bain and Struthers own two hundred thirty-seven and all the others one hundred eighty-five (see Tr. p. 124). Bain being elected president and Struthers treasurer, they continued to act until the fall of 1906 *The company had seven directors and every one of the seven stockholders was also a director.* The by-laws provided for a meeting of directors once a month, but no such meetings were held (125). The affairs, from January 1905 until November 1906, were managed and controlled by Bain and Struthers. Bishoprick was a salesman soliciting business on the creeks. Dwyer was a clerk in the company's store at Chena.

The Tanana Company, organized to do a merchandise business, both wholesale and retail, owned the "Ella," the barge "Independence, a 9-16 interest in the "Light," and it was also building a barge at St. Michaels to be named the "Dakota." These steamers were being used to transport freight for the company and others . The company had been so unsuccessful in the transportation business that the steamer "Light," during the one season that they had operated her, showed a loss of some

\$15,000.00 (257). In fact, it had cost that company \$77.01 per ton to transport freight from Seattle to Chena (258), a cost not including depreciation, insurance and winter quarters of the steamers. The company was heavily involved in debt, with a large overdraft at its bank and many lienable claims for the barge "Dakota" building at St. Michaels (724).

Such was the condition when Bain left Chena for Seattle in the spring of 1906. The company had previously discussed the sale of some of its boats in order to obtain funds to maintain its merchandise business (725). It had offered to sell its 9-16 interest in the "Light" in February 1906 for \$9500.00 (197). The "Ella" had cost \$6000.00, the "Independence" \$5000.00, and the "Dakota" then building, deducting lienable claims then due and pressing, about \$12,000.00 (129). This did not include any depreciation nor valuable equipment removed from the "Ella."

In reviewing the facts we divide them into

- (a) Negotiations at Seattle, (Isom-Bain);
- (b) Simultaneous consultations among directors at Chena;
- (c) Acquiescence during that season, 1906;
- (d) Ratification and estoppel by acts in 1907.
- (a) *Negotiations at Seattle.*

Early in July 1906 Bain, through a mutual friend, met W. H. Isom, general manager of the North American Transportation & Trading Company, engaged in transportation on the Yukon.

Bain proposed a sale of two boats and barges. He stated to Isom that the Tanana Company was in financial straits; that if he could get a fair price his company would like to sell the boats (498-9). The North American Company, on the other hand, had plenty of vessels and was only interested in tonnage. Bain stated that his company could not even pay for the "Dakota" then building (499). After some negotiations, Isom made an offer of \$57,000.00 for the two boats and barges. Bain in case of sale wanted a freight rate for his company's shipments thereafter of \$50.00 per ton. This Isom refused, so they finally agreed on \$60.00 (501), closing the \$57,000.00 price also on July 6th, and Bain representing to Isom that he had full authority for these terms.

It was not until July 7th that Bain told Isom that he had received a wire that the Tanana members were not entirely satisfied (502). They desired not to turn over the boats until the expiration of the second trip and then to get a special freight rate for the rest of the season, Bain showing on the 8th this telegram of Struthers to him of that date:

"Willing to sell our interests stated [that is \$57,000.00], boats to be turned over immediately upon expiration of second trip, we to get special freight rate balance season and next." (728).

Thus the purchase price was ratified but not the freight rate. Upon this Isom agreed to give \$60,000.00 payable \$10,000.00 in cash, \$30,000.00 for merchandise purchases, and \$20,000.00 in freight

hauls by Isom's company at a special rate of \$60.00 per ton. These were the terms on which Bain and Isom agreed on the afternoon of the 9th of July, the formal contract to be drawn, as it was, on the next morning (503). *The prevailing freight rate* in 1906 was \$70.00 per ton (463).

Up to this stage nobody, we think, can claim fraud in any degree. Bain, president and largest stockholder, was representing his company at a great distance from it and might reasonably be supposed by Isom to have latitude to adjust and concede in bargaining, and it might well be expected that the excesses or departures from instructions almost always occurring in officers' negotiations would be accepted.

On the afternoon of the 9th, the sale between Bain and Isom being thus completed with the exception of the formal papers, Isom wired his agent at St. Michael to take charge of the uncompleted barge (509). He also telegraphed his agent at Fairbanks to receive the other boats (Exhibits 29, 30). Bain for his part wired the agent of his company at St. Michael to deliver the barge (Exhibit 31) and his company at Chena as follows (Ex. 26):

“J. Fred Struthers, Vice Prest. Tanana Trading Co., Chena, Alaska.—Have made sale. Pass corporate resolutions and deliver boats and barges immediately to H. B. Parkin, agent for W. H. Isom. Wire when delivered.—A. E. Bain, Prest.—9:05 P. M.”

Both these telegrams were sent on the 9th at 5:16 P. M.

On the morning of the 10th the formal contract was signed. Simultaneously Isom telegraphed his agent at Fairbanks to make the \$10,000.00 payment on account of the purchase (519).

No word was received from Chena or Fairbanks until the morning of the 11th, when Isom received a telegram from his agent Parkin at Fairbanks (517). The telegram itself shows that it was received at Seattle at 9:15 P. M. on July 10, after office hours (517, Ex. 33). It mentioned a freight rate of \$30.00, *and was the first word that Isom had, either directly or indirectly, that any of the Tanana people had suggested a freight rate of such an amount.* Nor was it until *the 11th* that Bain spoke to Isom concerning any word from his associates (520), when, not showing Isom any telegram, he said that he had a telegram that he could not understand. His people were asking for a \$30.00 rate. Isom said: "If that is the case, you had better call the thing off. I won't consider such a ridiculous proposition, and Bain said, 'No, there is no doubt that there is a mistake in the code word.' The telegram was in code." (520).

The Tanana members we have seen had previously agreed to \$57,000.00 and a "special freight rate" and Isom had given \$60,000.00 and a special rate, and it was evening, July 11th, before Bain showed Isom a telegram from Struthers asking for payment in a different way (521).

On July 11th Isom, beginning to think from Parkin's telegram to him that there might be some misunderstanding about the \$30.00 rate, went to his attorney's office:

"I then asked him, I said, 'The way I acted is there any possibility of my getting into a legal complication on this. If so, I want to get right out of it at once,' and he said, 'You can't very well get out of it now. You have agreed to go ahead. They will sue you if you try to get out of it.' "

There was some difficulty about the title to the boats. The "Independence" was not registered in the Tanana Company's name but in Bishoprick's (528). Isom then proceeded to Alaska on his regular trip of inspection, and on August 23 met Dwyer at Fairbanks, but Dwyer said nothing to him about the freight rate, nor did any of the other members of the Tanana Company discuss this question with him (530, 531). Whatever may have been the alleged dissatisfaction at Chena (Fairbanks), Isom knew nothing of it.

Bills of sale to the vessels were then prepared in Fairbanks, executed by Struthers as vice-president and Dwyer as secretary, formally transferring the boats (Exs. 35, 36). Moreover, the \$30,000.00 had been advanced by Isom for merchandise, in accordance with the contract (539-542), and all payments were made, under the \$60,000.00, with the exception of \$1397.80, this item withheld because the N. A. T. had never received a bill of sale to the "Independence." (543).

The total freight charge to the Tanana Company for that year was \$41868.04 (545). We must remember that at the time the contract was executed (the 10th of July) Isom knew nothing about the \$30.00 freight rate (572), and it was not until the 11th that he got the information of a desired \$30.00 rate (578). Even then Bain said nothing about a resolution of the company (576) or that this was more than an ordinary dissent of some shareholder.

(b) Simultaneous Consultations at Chena among Directors.

Having recounted what transpired at Seattle in relation to the execution of the contract, let us turn to the action of the director-shareholders at Chena. Remember, no formal meeting of the board of trustees was ever had of this company from the time of its incorporation (125). Stockholder-director Livingston was not present in Chena in July. He was located at St. Michaels. On July 6 or 7, Struthers, Bishoprick and Dwyer received the Seattle telegram from Bain announcing the sale for \$57,000.00. These men responded to that telegram on July 7, in which no mention was made of the freight rate. They asked that the Tanana Company be allowed to complete a certain Pennsylvania cargo. "The boys" were anxious to sell (723-724) and this was deemed advisable by Bishoprick, Dwyer, and Struthers.

They then received Bain's telegram of July 7: "Foolish not to accept the proposition. Wire

amount immediately that will be accepted.” (728) to which Struthers replied on the 8th, after consultation with Bishoprick and Dwyer, that they were willing to sell their interests and that the boats would be turned over on the expiration of the second trip, the Tanana Company to get a special freight rate for that season and the next (728). No mention was made of any \$30.00 rate and only that they were to get *a special one* (729). It was on this attitude communicated by these in Alaska that Bain telegraphed Struthers on the 8th that he thought he could get \$60,000.00. This sum was discussed by the three at Chena (729). Cameron may have been present part of the time but did not participate in the discussion. Livingston was at St. Michaels and Blair absent. It was discussed only by the three (730).

They now received the telegram (Deft's. Ex. 32) already set out announcing the sale and requesting a corporate resolution, to deliver the boats and barges to Parkin, agent, and to wire when delivered. *This was considered satisfactory to these three.* Nothing had been said about a special freight rate. After six o'clock that night it was suggested by Bishoprick that they embody in the resolution that the freight that they were bringing forward on the Pennsylvania shipment should be landed free of charge, and Struthers said:

“Well, I said, ‘They won't stand for anything like that. Why don't you make it good and put

it at \$30. a ton?' and they made it \$30. a ton. I said, 'All right, we will draw up the resolution.'

"Q. That was the first time \$30.00 was mentioned?

"A. That was the first time absolutely that \$30. was mentioned.

"Q. Do you know what time that was?

"A. *That was on the evening of the 9th.*

"Q. Here is a telegram dated Chena, Alaska, July 9.—'A. E. Bain, Lincoln Hotel, Seattle, Washington.—Will accept \$60,000. our interest boats, purchasers to land our freight this season Chena flat rate \$30. Absolutely impossible to get Frank John agree to any other terms. Wire immediately. Can arrange McGinn to-day. Boats here.—Struthers.' "

By "Frank" and "John" were meant Bishoprick and Dwyer (731). This telegram was received by them at Chena on the evening of the 9th (732), at which meeting there were present Bishoprick, Dwyer, Struthers *and* Cameron (732). This meeting was not held in accordance with the by-laws, it was simply informal (733). On the evening of the 10th the members at Chena had an intimation as to the terms of the agreement entered into between Bain and Isom (736). Struthers was first advised of this in the following manner:

"Q. How did you find that out?

"A. Well, I had gone home from the store after they had had this signed up and the telegrams were sent, and was getting ready for bed.

"Q. What time was that?

"A. That was probably 10 o'clock, maybe half past 10, and a man came down on a run and said they wanted me down at the store right away. I thought the place was on fire or something and I got dressed, put on the remainder of my clothes and went down there, and as soon as I opened the door Bishoprick landed on me with a telegram and said: 'What do you know about this?' and I said, 'Let me see it and I will tell you what I know about it,' and it was a telegram from Bain that said: 'Will you stand by me on the sale, or 'I want you to stand by me on the sale.'

"Q. That is in the matter of the boats?

"A. It was.

"Q. 'In matter boat sale won't you back my action and turn over boats immediately. Advice McLean interests.—A. E. Bain,' that is the telegram? (See also Eccles deposition 1029).

"A. Yes sir, that is the telegram. They had two other telegrams there at the same time.

"Q. What were the other two?

A. I don't remember what they contained?

"Q. Just state what the conversation was between you and Bishoprick and Dwyer.

"A. Bishoprick handed me that very much excited and wanted to know what I knew about it and I took and read it over and I said 'I do not know anything about it, what do you know about it?' and he said: 'I don't know anything about it,' and he said, 'What do you think is meant by it?' 'Well,' I said, 'if you want to know what I think is meant by it, I think possibly the sale has gone through on a little different terms.' I said, 'Wouldn't it look that way to you?' and he said, 'Yes it would.' And he said, 'What are you going to do about it?' And I said, 'I am going to stand by Bain in the sale,' and he said: 'I was to tell you,

Struthers, I don't know whether you know, but I have been out there with Bain when he has been out to purchase goods and has been handling funds, and while I don't want to say or leave the impression that there is anything wrong with Bain, at the same time he always deposits all company funds in his own name. Now he is out there and we are sending him money, if he gets any big sum of money from the N. A. T. & T. Company it will all be deposited in his own name, and supposing he should die, we are right up against it. We might ultimately get that money back but it would possibly be hard work and we would have to prove that that is our money. Now I insist that all money paid to Bain by the N. A. T. & T. Co. is deposited with the Washington Trust Company in the name of the Tanana Trading Co.' I said, 'All right, Frank, I will telegraph him that in the morning.'

"Q. Did Bishoprick from this telegram know that the thing had not gone through corporate resolution?

"A. Bishoprick knew from this telegram that the thing had not gone through corporate resolution, and that was the only thing he said, when I told him that I would back Bain's action and stand by Bain, was his objection to any money being deposited by Bain to his own credit. He insisted it be placed in the bank in the name of the Tanana Trading Co.

"Q. Then you sent a telegram to Bain, did you not?

"A. Yes, I sent a telegram to Bain the next morning. (736-738).

* * * *

This telegram which Struther testified to is shown on p. 1030, Eccles:

"I will stand by you on boat sale and barges. Wire Bonnard particulars of sale. Specify rate allowed us. Address all telegrams private nature Bonnard. Must have 50,000 deposited Washington Trust Company credit Tanana Trading Company. Have them wire us to that effect. This must be done to avoid trouble here. Portion of this is to apply freight charges. Give Isom check to cover when he gives you check 50,000. Wire what has been done future shipment. Will then wire what we absolutely need. Get their guaranty shipments will be delivered this season. Come home by Dawson immediately. Have Pennsylvania shipment bill prepaid. Will be unable to stay storm unless full amount 60,000 shows fifty there ten here all credit Tanana Trading Company. McLean wants \$15,000 his share boat. Merchandise selling here at cost. Answer at once. Ella sold yesterday. Light turned over to-day.—Struthers."

Bishoprick and Dwyer also saw the telegram of Isom to Struthers of July 11th regarding full payment and providing that Bain should have \$30,000.00 for use in buying merchandise and that \$20,000.00 balance was to be held on account of future freight (743).

(c) *Acquiescence During that Season, '06.*

During the summer of 1906, after this contract was signed in Seattle, up to October 22, payments were made *by the Tanana Company* through its proper officer at Chena to the North American Company *for freight* transported by the latter company at the rate of \$60.00 a ton as follows:

Sept. 8	\$11211.58
Sept. 8	3500.00
Sept. 28	1900.00
Oct. 5	3500.00
Oct. 17	2500.00
Oct. 23	1000.00

Making a total of \$23611.58 (543)

This left a balance of freight money due from the Tanana Company of \$16082.19 (541), which was credited on the \$60,000.00 purchase price of the boats, so the North American Company has discharged this \$60,000.00 by the original cash payment of \$10,000.00 by draft to Chena from Seattle and by the cash advances in Seattle for merchandise, leaving only, as stated previously, \$1397.80 due. (Ex. 41).

Observe the receipt at Chena of the \$10,000.00 cash payment August 6th, that season, additional acquiescence.

The expense bills for the freight began arriving at the Tanana Company's store in August. (See freight and expense bills, pp. 1279-1332, also p. 742). Nay, more, *many of these bills specified the contract rate, \$60.00 per ton.* The attention of the court is directed to this, and where the rate was not specified, it could easily be figured from the cost and the tonnage (753). *These bills were received at Chena and were checked over by the members there, including Bishoprick and Dwyer (754).* Thus these last two, subsequent dissenters, were parties to active acquiescence in what they afterward claim was the unauthorized act of only Bain and Struth-

ers. As the freight was removed from the steamer to the warehouse, the freight was checked by means of these very bills, and Dwyer arranged for the storage of the freight. After the freight was checked up the expense bills hung in the office at all times where the members could see them (755, Deft's Ex. 47). On September 8th there was a large shipment received from the N. A. T. Co. on which payment was required before delivery. At that time Dwyer and Bishoprick were present (757).

Bain had arrived from Seattle. He reached Chena September 12 (762). The contract which he had entered into he read to all the members in the company's store. And after this the Tanana Company continued to receive freight from the defendant under this contract. And, more, it continued to pay for it. *No protest concerning the rate was made by the Tanana or any one on its behalf.* (764). No action was taken until October 23, when Livingston protested, *not to the defendant, but to the bank* on which the check was drawn (765). The operating season was now finished without a protest. The Tanana Company had gotten the full benefits of the bargain.

(d) Ratification and Estoppel by Acts in '07.

In the latter part of October '06, after the close of navigation, friction arose in the company. Bain and Struthers attempted to discharge Dwyer

and Bishoprick. In our opinion this quarrel (and not the sale of the boats) is the root of the present suit. Dwyer and Bishoprick retaliated by calling a meeting of directors, so arranging matters as to cause to be issued to Livingston 325 shares of capital stock of the value of \$32,500.00 for the nominal consideration of \$325.00! They sought to have it appear that Livingston had purchased \$32,500.00 worth although not a dollar passed (164, 293). Their purpose was to give the minority control (293). Bain and Struthers were thus removed from office, the minority members, by means of this bogus issue (and at a meeting not held under the by-laws) resolving to commence suit against the North American Company, Bain and Struthers (142), charging the three with fraudulent conspiracy in the sale.

But Bain and Struthers simultaneously started suit against the other members to restrain the \$32,500.00 issue to Livingston (Ex. 49). With these two suits pending between shareholders, the company was in constant friction, so it was finally decided that its affairs be wound up. Arriving at this conclusion, *all the stockholders* met on January 1, 1907 (284). Certain resolutions were passed. All were agreed that the company should be wound up, the suit of Bain and Struthers against the other members dismissed, and Bain and Livingston left in full charge, "to have sole and exclusive charge of said business' for the purpose of winding up.

This meeting of January 1, 1907, was attended by all the stockholders and directors (289) and certain resolutions were passed.

Resolution No. 1 provided:

“It is hereby agreed that such notice (of the meeting) be dispensed with and that all parties hereto expressly waive the service of notice of such stockholders’ meeting.” (285).

Resolution No. 2 provided that the company “be dissolved and that said corporation from this time cease to exist, save and except for the winding up of its affairs,” and further “that the affairs of the corporation from this time on shall be vested in A. E. Bain as president and treasurer and A. T. Livingston as secretary, who shall act as trustees for the benefit of the balance of the stockholders,” and said “A. E. Bain and A. T. Livingston to have the sole and exclusive charge of said business and to manage and control the same in the winding up of the affairs of said corporation as they shall see fit.” (286).

Resolution No. 3 provided in case of dispute between Bain and Livingstone, such dispute “is to be determined by three arbiters.”

As a part of the same transaction a *fourth* resolution was passed. This was also a written agreement (Deft’s. Ex. 23) releasing Bain and Struthers from all liability on account of the present suit, in which the two individuals, as we have seen, had been made co-defendants. But fearing that this

release would release also the North American Company, it was agreed that this resolution and agreement should not go on the minute books (784), one Cohen, an attorney, objecting to that (960).

Here is this document signed by every shareholder and every director of the company:

“This agreement entered into this thirty-first day of Dec. A. D., 1906, by and between the Tanana Trading Company, a corporation organized under and by virtue of the laws of the Territory of Alaska, and Frank Bishoprick, A. T. Livingston, John A. Cameron, W. A. Blair and J. J. Dwyer, parties of the first part, and A. E. Bain and J. Fred Struthers, parties of the second part:

Witnesseth:

That whereas the parties of the first part did on the day of Dec. A. D., 1906, institute a certain action in the District Court for the Territory of Alaska. Third Division, against the said A. E. Bain and J. Fred Struthers and the North American Transportation and Trading Company, as defendants which said action is number 640; and whereas the parties hereto have this day amicably adjusted all differences existing between them, and the parties of the first part have agreed to release the parties of the second part from any and all causes of action and damages arising out of the matters and things set forth in the complaint in the above mentioned action numbered 640;

Now, therefore, in consideration of the above and foregoing said parties of the first part do hereby release and relieve said parties of the second part from any and all liability for the matters and things set forth in the complaint in said action numbered

640, and do hereby promise and agree to release them, the said second parties, from any cause of action for damages arising out of the same.

A. T. LIVINGSTON,
FRANK BISHOPRICK,
WM. A. BLAIR,
By Bishoprick, his proxy,
JOHN A. CAMERON,
J. J. Dwyer."

(Defendant's Exhibit No. 23; Tr. p. 1240).

As to the release of Bain and Struthers in the *first* suit, the company's suit against them and the North American Company, Shareholder Dwyer states:

"Q. The paper (Ex. 23) that you have in your hand there was a part of the settlement that your people had arrived at in regard to your business affairs down there, was it not?

"A. Well, there were two different parts. There were resolutions and this was just an agreement, a joint agreement.

"Q. They were signed down there the same time the others were signed by you?

"A. I am satisfied I signed down there.

"Q. And that paper was with you at the time that you held a stockholder's meeting and you were present at the meeting of January 1, 1907?

"A. That is, when the resolutions were adopted?

"Q. Yes.

"A. Yes. (960).

* * * * *

“Q. You thought this would affect your N. A. T. & T. Co. suit?

“A. I did not intend to let it.

“Q. It was supposed to be kept under cover at that time?

“A. How do you mean, kept under cover?

“Q. I thought you stated that Cohen told you that Cohen and I had some kind of an understanding of some kind?

“A. Yes sir.

“Q. What was that professional gentleman's agreement?

“A. I presume he had your word that this here wouldn't interfere with the N. A. T. & T. Co.'s suit.

“Q. That it wasn't to come to light and therefore not affect the N. A. T. & T. Co.'s suit in any way?

“A. Yes.” (964).

As to the *counter-suit* of Bain and Struthers, Bishoprick, plaintiff's witness, testifies (288):

“Q. Now this suit that was spoken of that it was agreed should be dismissed was a suit instituted by Bain and Struthers on the 15th day of November, 1906, to set aside and cancel this issue of stock that had been made to Livingston, and to enjoin the Tanana Trading Company from issuing any stock or from allowing the said Livingston to use said stock at the stockholder's meeting that was to be held in January 1907?

“A. Yes sir.

“Q. And that suit was subsequently dismissed pursuant to this agreement?

“A. Yes sir.

“Q. And it was agreed that the sole management and control of the business should be turned over to Livingston and Bain?

“A. Yes sir, for the winding up of the business and closing out the merchandise.”

And the stockholders did choose Bain and Livingston for this purpose (785). And the suit now on appeal, as far as it concerned Bain and Struthers as co-defendants with the North American Company, was dismissed as to them both. The original complaint in this action shows Bain and Struthers joined as co-defendants and conspirators. (Ex. 53, 786).

But this is not all. While Bain and Livingston were thus in 1907, the year following the sale, in sole and exclusive charge of the winding up, an order was given by their company upon our clients and the sum of \$1000. was received on account of the very contract forming the basis of this suit. This occurred in August 1907 (624):

“Fairbanks, Alaska, August 22, 1907.—To the N. A. T. & T. Co., a corporation:—You are hereby instructed to pay A. T. Livingston the sum of \$1000.00 at Seattle, Washington, the same to be in partial payment of the sale of the steamers made by the Tanana Trading Company to you in July 1906, and said amount to be deducted from the balance due the Tanana Trading Company on account of said sale.—Tanana Trading Company by A. E. Bain, President.” (Deft’s. Ex. 22, 1239).

This payment was made to the Tanana Trading Company under the following receipt:

Seattle, Washington, August 31, 1907.

“North American Transportation & Trading Co.,
Seattle, Dr.

To Tanana Trading Co.

“No. 2374.

“Partial payment on account of balance to
Tanana Trading Company for sale of steamers
under contract of July 10, 1906, \$1000.00

“E. G. SHORROCK

W. McA.

Examined

Examined and found correct

J. B. SHALLENBERGER

Approved

Approved by payment.

W. S. B.

\$1000.00

Dated August 31, 1907

Received of North American Transportation
& Trading Co. \$1000. in full settlement of above
account.

TANANA TRADING CO.,

A. T. Livingston, Secretary.”

(Deft's. Ex. 21, 1238).

Let us examine this contract as an executed transaction. The Tanana Company delivered to us the boats and barges as called for in the contract. We paid the Tanana in cash at the time of the transaction, \$10,000.00; subsequent cash items, \$2250.00; merchandise paid for, \$25812.62; to Livingston to discharge lienable claims against the barge “Dakota,” \$3300.00; freight charges for freight earned, \$16,000.00; various small items ranging from \$10.00 to \$500.00 for charges against the

various boats incurred prior to delivery, leaving a balance due the Tanana Company of \$1397.80, which is withheld, as before stated, for the reason that the Tanana Company has never delivered title to the bark "Independence." These items are all set forth in defendant's Exhibit 41, and are explained in the testimony, page 538. No part of this sum of some \$59,000.00 has ever been returned or offered to be returned to the North American Company and no demand was ever made by the Tanana Company for the return of the boats (536).

The only dissatisfaction of Bishoprick and Dwyer to the contract as actually made and carried out was that the freight rate was \$30.00 instead of \$60.00. In all other respects they were satisfied. (296).

This is their own testimony. It is significant that these two small minority stockholders are the only members who have shown any interest in this litigation. Bain, Struthers and Livingston have expressly ratified the contract. Cameron and Blair neither appeared as witnesses nor was their absence at the time of the trial accounted for. But there is one thing we have seen they did. They attended that final meeting of all the shareholders and directors, joined in the secret resolution to let Bain and Struthers off, signed a paper to that effect, actually let them off from liability, and restored Bain to lost control, under which as late as August '07 he got for them the final \$1000.00 out of our defendant client.

OUR OPPONENT'S STATEMENT OF THE CASE.

The first four and a half pages of plaintiff's brief contain a repetition of its amended complaint. The charges of fraud and conspiracy are reiterated.

Counsel have assumed the *proof* to be the same as their own allegations in the complaint.

First. Their brief, p. 6:

"During the transaction between Bain and Isom in Seattle and prior to the consummation of the sale Bain received advise from Chena to the effect that the directors of the company positively refused to sell unless the defendant company would pay \$60,000 in cash, and unless it give a \$30. freight rate. Isom also knew this for the reason that Bain testified that he showed him a telegram stating that the directors at Chena positively insisted upon the \$30. rate."

They cite pages 520 and 579 of the transcript, but the testimony itself does not sustain any such statement:

Isom says:

"Q. I will ask you to state whether or not prior to the time of the consummation of this sale Bain showed you a telegram that he had received from the Tanana Trading Company or from J. Fred Struthers?

"A. Not prior to the sale, no.

"Q. When did you first, if ever, see any telegram that either Struthers or the Tanana Trading Company had sent to Bain?

“A. My attention was called to two telegrams that I think were received at Seattle on the 11th of July. One of these telegrams I saw, the other I did not. Mr. Bain came to see me at the hotel on the morning of July 11th, I think, before I went to the office, and said to me: ‘I have a telegram from my people and they do not seem entirely satisfied with the deal I have made.’ I said, ‘What is the trouble now?’ ‘Well,’ he says, ‘I have a telegram from them, it is an odd one, there is some mistake about it, it is so ridiculous.’ I said, ‘What is it,’ and he said, ‘They are asking for a \$30 rate on freight,’ and I said, ‘If that is the case we had better call the thing off. I would not consider such a ridiculous proposition,’ and he said, ‘No, there is no doubt that it was a mistake of the code word.’ The telegram was in code.”

“Q. Did you see that?

“A. No, he simply mentioned it.

“Q. You did not see any of the telegrams?

“A. No sir.”

Again, p. 579, to which counsel refers, after quoting a long telegram dated Chena, July 11th, in which Struthers says: “I will stand by you on the sale,” plaintiff’s counsel asked Isom if he did not see this on the morning of the 11th:

“A. Not on the morning of the 11th, no sir.

“Q. When was it?

“A. The afternoon of the 11th.”

Thus on the very references made by the learned counsel in their brief to the testimony, the statement just quoted from their brief is incorrect.

At the bottom of page 6 counsel say Isom showed this telegram to his attorney, and that his attorney advised him that he might safely proceed with the deal, and that the worst that could happen might be that they could sue Isom for the difference in freight. They cite us "Tr. 524." But when we refer to that page of the transcript we find that this discussion between Isom and his attorney occurred on the *11th* of July, *two days after the contract was made, and after \$10,000 cash payment had been made to the Tanana Company.*

Second. Brief, p. 7, counsel say: "Isom admitted that he, Isom, knew at that time (August 1906) the directors of the company other than Bain and Struthers were in ignorance of the \$30 rate provision in the contract (Tr. p. 593)."

When we look at "Tr. p. 593" we follow to other pages:

"Q. (to Isom) Did you disclose those facts to any other member of the Trading Company?

"A. I was not asked about it by any one.

"Q. Did you disclose it to any one?

"A. No, to the best of my knowledge I did not.

"Q. But you left out the little item of the rate per ton, didn't you?

"A. That I supposed they understood." (596).

"Q. You didn't intend to let them know they weren't getting it at that time?

“A. If they asked I would have told them.” (597).

“Q. You knew that when you were getting Dwyer to sign that paper and you knew that the Tanana Trading Company supposed that the contract had been entered into for a \$30 a ton flat rate?

“A. No, I didn’t suppose any such thing.

“Q. You did not tell them any better?

“A. No. I supposed that Bain had sent a copy of the contract.”

Third. Brief, p. 8, counsel refers to pages 741 and 843. That Struthers withheld knowledge from Bishoprick and Dwyer. What is the testimony on those very pages?:

“Q. (to Struthers) What did Bishoprick say in regard to these contracts that he was going to enter into in regard to feed as to the freight rate?

“A. He said that if our rate is \$30.00 we will make \$30.00 a ton on feed. He says: if it is as high as \$60.00 we won’t lose any money, and if it is between \$30 and \$60, we will make the difference between that and what it is contracted for. I knew that the rate on feed was higher than \$60. from Bain’s telegram.” (741, 742).

And as for page 843, the actual testimony is by Struthers:

“Q. After receiving this telegram from Isom they knew everything you knew down there except the \$60.00 rate?

“A. They would know everything I knew except the \$60 rate.

“Q. They would also know that A. E. Bain had not made the sale there in accordance with the resolution?

“A. They knew that the night they got the other telegram.

“Q. What other telegram?

“A. The telegram directed to me and asking me to stand by him in the sale.

“Q. They told you it looked suspicious?

“A. They put it a little stronger than that.”

Fourth. Brief, p. 11. Counsel say the amounts which the defendant company paid upon the purported contract of July 10, 1906, before the minority stockholders obtained knowledge of their fraudulent scheme, were \$10,000.00 cash paid to a *Seattle bank* to clear a *lien* on the J. P. Light, pursuant to a draft issued by the Tanana Company and \$21,916.24 paid to the defendant company at Seattle on account of merchandise purchased by Bain. Citing “Tr. pp. 539, 1228.”

The facts are the \$10,000 cash was *not paid* to a *Seattle bank*, but by Parkin, Isom’s agent at Fairbanks, to the *Tanana Company at Fairbanks*. (520). In addition to the \$21,916.24, counsel’s own citation (539) shows *other large amounts* paid on account of merchandise and lienable items. All these payments are itemized and conveniently stated in defendant’s Exhibit 41.

Fifth. Our opponents’ next statement (their first paragraph p. 12) is not supported by any reference to the testimony. Counsel makes here the

grossly incorrect statement that on the basis of a rescission of this contract all they have to tender back to our clients is \$9000.00, which they are now not even tendering in this court, but professing a willingness to credit upon their damages. Throwing out of the question the necessity or propriety of tender, and looking only to the amount, this balance or credit of \$9000. is ridiculous. By turning to defendant's Ex. 41, your Honors will see what are in this case the undisputed items on both sides. It will there be seen that our clients have advanced in all more than \$60,000.00, *even if the freight be charged at \$30. a ton.* We paid them, in other words, \$10,000. in draft paid at Chena at the outset, approximately \$25,000. in funds for merchandise purposes at Seattle, discharging liens on the Dakota, \$3,300.00; and now we will say the freight, 700 tons at only \$30.00 a ton. This last item of \$21,000.00 makes, upon their own figures, an advance by us of about \$60,000.00. From them we have received only \$23,000.00 freight paid at Chena (under expense bills as already shown, and we may add at a \$60.00 rate). This alleged small balance of only \$9000. becomes still more ridiculous when we will suppose for a moment that we hauled the freight for nothing. Dropping out entirely, then this item of \$21,000.00 and hauling the freight for nothing, we present an advance of approximately \$39,000.00 on our side, and have received only \$23,000. from them. This would leave at least \$16,000. in our favor.

We presume, however that counsel will not ask this court to consider us as hauling the freight for nothing. The balance, then, is against them at about \$39,000. We deal with these figures as absolutely against our opponents, because they expect the boats to be returned and so demand. That item consequently disappears as a debit against us, for our opponents are maintaining that even on the return of the boats to them, they will owe us only \$9000., which, as already stated, they do not offer to return but will credit after getting the boats back on the damages which they allege their company has suffered by reason of not having the boats during the operating season of '06 on the Yukon.

Perhaps nothing more fully illustrates the folly and unfairness of this lawsuit than an analysis of these figures. In a word, this unreasonable plaintiff, claiming damages as to being deprived of the boats, puts itself in the position of being allowed to keep them for purposes of an accounting, yet in the accounting demands these boats back, in order to reduce what would otherwise be the heavy refunds necessary to be made by them to us.

Sixth. The only direct quotation, in *haec verba*, from the testimony by our opponents, is as follows, on page 20:

“Struthers himself testified that the ‘boys didn’t get next’ until September 12, 1912.” (Tr. 850).

Examine p. 850: Not a word of this quotation

is there. What is there is actually the contrary. Struthers says:

“Q. What do you say now would cause them, that is Bishoprick and Dwyer to know that freight was coming in at a different rate?

“A. The expense bill would show it was coming in at a different rate.

“Q. They would know from that?

“A. Yes.”

It may be that some part of the testimony in this case has this quotation of our opponents but we have not found it.

Seventh. Counsel then refer to lack of knowledge that they were making payments all the while on freight at \$60.00 rate, citing “transcript 854.” We have searched that page but it is not there.

Eighth. Citation at the top of page 23, brief, “Tr. p. 783,” is evidently error. There is no testimony as therein stated.

ARGUMENT.

1. Bain was authorized to make the sale.
2. Ratification and estoppel.
3. Release of Bain and Struthers was a release of this defendant.

1. *Bain's General Authority.*

By its course of dealings from the time of its organization in January, 1905, the Tanana Company held out its president Bain as authorized to conduct all its affairs. We have seen that the company held no corporate meetings, either of stockholders or directors. Large corporate transactions were executed by Bain. He was given some \$40,000.00 and with no limitation bought merchandise. General discussions of corporate affairs had taken place among the stockholder-directors, and contracts were made and executed for the corporation accordingly as each member might feel that it was advantageous for it. Bishoprick had purchased a steamer without any corporate action (189) Whenever a question of policy arose, it was simply discussed among the members in an informal manner. All stockholder-directors felt the necessity and advisability of a sale of the boats.

Bain, with large discretionary powers was in Seattle; his associates miles away in Alaska. An opportunity to sell to advantage presented itself. Bain

telegraphed to his associates that he *had sold* for \$57,000. What was their response?

“Willing to sell our interests stated [that is \$57,000.00], boats to be turned over immediately upon expiration of second trip, we to get special freight rate balance of season and next.” (728).

It is not contended that the actual contents of this telegram was communicated to Isom. This telegram was the expression of opinion of Bain's associates that it was deemed advisable to sell at \$57,000.00 with some minor suggestions as to the disposition of pending cargoes and freight rates. It was never contemplated by any of the members that these suggestions could in no way be modified by either side.

Under the general authority granted President Bain and the suggestions contained in the above telegram, was not Bain fully authorized by his company to bind it by the contract made? Both sides to this contract made some concession from these suggestions. This is quite usual in all business dealings. Isom gave \$60,000.00 instead of \$57,000.00, the special freight rate was granted, as it will be recalled that the prevailing and usual rate was \$70.00. (463). In exchange for the increased price, Bain, for his company, agreed to a delivery of the boats at once. Opponents must concede (a) that where an officer has exercised power within the general scope of his actual authority and within the powers of the corporation to buy and sell property for such period of time as justifies others in believing that his acts

are within his powers, that his contract is binding on his company, whether he had the actual authority to enter into it or not. *Martin v. Webb*, 110 U. S. 7; (b) that where an officer has specific authority to enter into a contract, a slight deviation from the general authority thus given will not invalidate his act on behalf of the corporation. *Jenson v. Toltec Ranch Co.*, 174 Fed. 86 CCA.

2. *Ratification and Estoppel.*

These two subjects are so closely related that we discuss them together. The following acts and circumstances show that the plaintiff is not now in a position to question the contract:

1. The suspicions of July 10.

2. Delay in acting until November 20.

3. Accepting and retention of benefits under the contract:

(a) \$10,000.00 in cash.

(b) \$25,000.00 merchandise money July and August '06.

(c) Receiving and paying for freight without protest at \$60.00 rate August, September and October, '06.

(d) \$1,000.00 cash August, '07.

(e) No demand for return of vessels and no tender of consideration received.

4. Written consent of all stockholders save 85 shares out of a total issue of 421.

5. Stockholder-directors' own admission that only objection to contract was the \$30.00 rate.

6. Release of Bain and Struthers at meeting attended by all.

There is a broad distinction between acts which are *beyond the corporate powers* and acts which are *in excess of authority granted*. This contract was within the corporate powers of the plaintiff. Another distinction exists between the enforcement of an executory contract *and the rescission of a contract which has been executed*. This contract is executed; the defendant has received the boats and plaintiff the purchase price.

Inactivity. Now it was on the evening of the very day that this contract was signed in Seattle that Bishoprick and Dwyer at Chena, Alaska, became suspicious. Bishoprick himself opened the telegram of Bain to Struthers. "In the matter of the boat sale, won't you back my action?" Bishoprick says that when he opened this telegram, he sent word down to Struthers to come to the store immediately.

"He came up there to the store and I asked him what this meant. 'Well,' he says, 'you can answer that as well as I can.' He says, 'I don't know anything about it.' 'Well,' I says, 'that looks kinder suspicious to me. * * * We were very much excited at that time, thinking it looked rather suspicious.'"

“Q. You got the telegram and opened it yourself?

A. Yes sir.” (940).

Further testifying in regard to the telegram on the evening of the 10th (944):

“Q. And you were suspicious?

“A. Yes sir.

“Q. It didn’t sound just right to you?

“A. It certainly did not.

“Q. You felt as though the sale had not gone through according to the resolution.

“A. That is what that telegram led me to believe.

Q. So you asked Struthers about it and he said, ‘You know as much about it as I do?’

“A. Yes sir.” (944).

With their suspicions aroused, what did Bishoprick and Dwyer do? No inquiry was made of Bain, Isom, the defendant company, or any of its officers. Instead, these men without one word in opposition, saw \$10,000. paid to their company; merchandise bought on its behalf; the discharge of pressing liens on its vessels; the reception of freight and payment therefor. The internal affairs of the Tanana Company from July 10th ran as smoothly as they had before that time, until Bain and Struthers, the majority stockholders and the active heads of the company, informed these gentlemen that their services as paid employees of the company were no longer

necessary. It was not until Bishoprick and Dwyer received this notice that they made any move. This was in October. Still no protest to the defendant. Then by means of the fictitious issue of stock to Livingston at a quasi meeting of directors, this suit was determined upon.

It was the duty of these men, when their suspicions were aroused on July 10th, to act, and that promptly. In *Egbert v. Sun Co.*, 126 Fed. 568, the court said:

“It was of course known that the president, under the general authority which he exercised, had made whatever agreement was made, and therefore the omission of the board to make any inquiry respecting it must be taken to have amounted to an affirmation of his powers to settle and prescribe its terms.”

The minority stockholders could not stand by in order to determine whether or not this contract would prove advantageous to the company. *It was then in process of execution.* Prompt disaffirmance brought home to this defendant was necessary.

Reception and Retention of Benefits.

Your Honors have had occasion to pass on this question of ratification of corporate acts numerous times. Attention is directed to three of these decisions, all of them involving the validity of corporate contracts entered into on behalf of a corporation by the president. In all of them it was contended that the president was acting in excess of his authority.

Alaska & Chicago Commercial Co. v. Solner,
123 Fed. 855;

Washington Irrigation Co. v. Kurtz, 119 Fed.
279;

Owyhee Land & Irrigation Co. v. Tautphas,
121 Fed. 343.

The *Solner* case is particularly applicable on the facts to the case at bar. In that case the sale was of *all of the assets* of the corporation by Bauerle purporting to act as its manager. The assets consisted of real estate of the alleged value of \$10,000. and a stock of merchandise of \$15,000. All were sold for \$5000. (The court will note that in the case at bar, the boats were sold to the defendant at a price about twice the valuation placed upon them by the plaintiff). The power of this agent to make the sale was even questioned by Solner, the purchaser, and it was recited in a written memorandum that Bauerle gave Solner, that while the conveyances were somewhat “questionable for want of sufficient authority on the part of said William J. Bauerle to execute the same for and on behalf of the corporation.” the agent agreed that he would secure proper conveyances if necessary. The money was paid by Solner into the corporation. The corporation brought suit to rescind this sale made to Solner and to recover damages of \$15,000. After discussing the question of tender, to which reference will presently be made in a subsequent part of this brief, Your Honors said, concerning the ratifi-

cation of the contract by the acceptance and retention of the benefits under it:

“The amended complaint, filed more than one year after the suit was brought, alleges a full knowledge of the sale upon the part of the corporation; but there is no averment therein tending to show any disaffirmance thereof by the corporation. In *Indianapolis Rolling Mill v. Railroad*, 120 U. S. 256, 259, 7 Sup. Ct. 542, 544, 30 L. Ed. 639, in discussing the direct question here involved, the court said:

“The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent required that, if they had the right to disaffirm it, they should do it promptly, and if, after a reasonable time, they did not so disaffirm it, a ratification would be presumed. In regard to this it appears that the board, when notified of what had been done by their agents, did not disaffirm their action at that time, but that the act or resolution of disaffirmance was passed about two years after notice of the transaction, and that, if the suit brought in this case can be considered as an act of disaffirmance, it came too late, as it was commenced some six months after they had knowledge of the release. As we stated in the somewhat analogous case of the *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 592, 23 L. Ed. 328, “the authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party, with whom that right is optional, is aware of the facts which gave him the option, are numerous. * * * The more important are as follows, *Badger v. Badger*, 2 Wall. 87 (17 L. Ed. 836); *Harwood v. R. R. Co.*, 17 Wall. 78 (21 L. Ed. 558); *Marsh v. Whitmore*, 21 Wall. 178 (22 L. Ed. 482); *Vigers v. Pike*, 8 Cl. & Fin. 650; *Wentworth v. Lloyd*, 32 Beav. 467; *Follensbe v. Kilbreth*, 17 Ill. 522, 65 Am. Dec. 691.” ’ ’ ’

* * * * *

“When Bauerle executed the deeds he acknowledged that his authority to do so might be questioned, and he believed that his acts would be ratified. He was an officer of, and authorized to manage the business of, the corporation. He assumed the responsibility of making a sale of the property, and from a portion of the proceeds paid certain debts of the company. The corporation received and applied the proceeds without making any objection to the sale. It must be assumed from his acts and conduct, in the absence of any showing to the contrary, that he communicated all the facts to the corporation. With knowledge of the facts, the corporation did nothing. It neither actively affirmed nor disaffirmed the transaction. When the entire testimony in this case is examined, we are of opinion that it must be presumed by the silence and acquiescence of the corporation that it was satisfied with the acts of its secretary and treasurer, and for the failure within a reasonable time to disavow his acts it must be held to have ratified the same. It could not play both hot and cold at the same time, and wait to see what would be the result of the suit brought by Heinze. Equity and good conscience required that it should act promptly in the premises, and its assent may be implied from silence or from failure to act, or it may be inferred from circumstances. *Leggett v. Mfg. Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728, 738; *Choteau v. Allen*, 70 Mo. 290, 325; *First National Bank v. Kimberlands*, 16 W. V. 555, 581. It need not be shown by direct evidence that the acts of the agent were expressly approved by the board of directors, ‘but,’ as was said in the case last cited, ‘such ratification may be inferred from their accepting the benefits of the act or contract; as, if under the contract so made by the president or other officer money is to be paid to the corporation, and it is received by the corporation, and applied to their use, *even without the knowledge of the directors, if it is not returned when it becomes known to the directors that it has been applied to*

their use, such conduct would be a ratification of the contract of such president or other officer."

And in the *Kurtz* case, it was said:

"The corporation could not accept the conveyance of the land upon which the consideration of the contract was based and then deny the authority of its president to enter into the contract."

That case was likewise based upon a contract made by a president of a corporation, in which it was alleged that the president exceeded his authority, but the corporation was held bound to the contract so made by reason of the fact that it had accepted and retained the consideration therefor.

In the *Owyhee* case, where the contracts had been executed by the president and had been repeatedly recognized by the corporation by payment of a large part of the consideration, it was held that after full performance by the other party, the corporation could not question the validity of the contract, that there was no merit in the case, and that judgment was affirmed with a ten per cent. penalty for frivolous appeal.

The doctrine of ratification has been thus firmly established in this circuit. Analogous allegations to those in plaintiff's complaint are found in *Metcalf v. American School Furniture Co.*, 122 Fed. 115, in which it was alleged that *the directors and another corporation had conspired* to injure the corporation of which the complainant and her associates were minority stockholders, by a transfer of the corporate assets. The court said:

“Having in mind the legal distinction between the right which the corporation possesses to rescind a contract on account of fraud and by reason of acts claimed to be *ultra vires*, how can it be insisted that the solemn contract made between the Buffalo Company and the American Company should be set aside, after it had become executed, in obedience to the behest of the complainant? Her right, as heretofore stated, is not enlarged beyond that of the corporation. Her status is accordingly narrow and circumscribed. Title to property and its possession having passed to the grantee, the corporation is estopped from seeking a rescission of its contract. A stockholder standing in the shoes of the corporation likewise is estopped from asserting the invalidity of such an act. A court of equity would undoubtedly, at the suit of a stockholder, enjoin a threatened act by the corporation beyond its granted powers. *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 557. But it is strenuously urged by complainant that the *ultra vires* acts invalidated the contract of sale. I think the weight of authority is against an interpretation of the doctrine of *ultra vires* as claimed by complainant. *Holmes v. Holmes*, 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448; *Miners’ Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 30. In the former case the court said:

“‘But assuming the transaction to have been *ultra vires*, the defense as interposed would still be unavailable. The plaintiff has the stock, and has paid for it. It cannot be recovered back by the defendant, for the transaction is completed and closed. Whilst the contract remained executory, if it was unauthorized, a stockholder or person interested might have interfered by injunction, and prevented the transfer of the property of the plaintiff to the defendant; but, the contract having become executed, the title to the stock now vests in the plaintiff, and it has the power to sell or dispose of the same.’ ”

Cases from other circuits are as followys:

Jenson v. Toltec Ranch Co., 174 Fed. 86;
Augusta T. & G. R. Co., v. Kittel, 52 Fed. 53;
Kingman & Co. v. Stoddard, 85 Fed. 740;
Simon v. Goodyear Metallic Rubber Shoe Co.,
 105 Fed. 573.

And whether the acts relied upon constituted ratification is a question *not for a jury but for the court*.

Marqusel v. Insurance Co. of North America, 211 Fed. 903.

It is the general rule in corporate action that the will of the majority shall control. This sale was of only a portion of the corporate assets. Suit was started as the result of an unauthorized corporate meeting, and was rendered possible through the influence of the Livingston stock, already referred to. Of the 421 shares regularly issued by the Tanana Company, we have the following assenting to the sale by written ratification:

Bain	138
Struthers	100
Livingston	53 (Ex. 28)

In addition to these shares are Blair with 25 and Cameron with 20, who have not participated in any way in this action, thus leaving Bishoprick and Dwyer the only protesting stockholders, with a total issue of 85 shares. The inference clearly is that all other stockholders are satisfied. Dwyer testified that he and Bishoprick were the only dis-

satisfied stockholders (454). It is not the policy of the law to allow the whim of one or two small dissenters to control the will and wishes of the overwhelming majority. As was said in *Carson v. Alleghany Window Glass Co.*, 189 Fed. 791, at 804:

“The complainant stands alone as to the complaining party, yet this court, having jurisdiction of the subject-matter and of all the parties as they now stand on the record by reason of diversity of citizenship and the amount in controversy, any other stockholder, by virtue of his stock ownership, and regardless of his citizenship or the value of his stock, was entitled to intervene by leave of court. That no other stockholder has sought to intervene, justifies, in the absence of evidence to the contrary, an inference, by no means conclusive of the case it is true, that the other minority stockholders either do not view the contract of purchase as unfavorably as does the complainant, or believe that the setting aside of that contract under existing circumstances would be more detrimental to than promotive of their interests as stockholders. Further there is no evidence that of the minority stockholders other than the complainant, more than a small part of any number or amount sympathized with the purpose of the bill.”

A somewhat analogous situation occurred in the Solner case already referred to, in which it appeared that one Heinze, a dissenting minority stockholder, was the instigator of the suit brought by the plaintiff corporation. Again the dissent of this small minority stock was not as to the *whole contract* but only as to the \$30. freight rate. This was Bishoprick's own testimony (296). A party cannot affirm that portion of a contract which he deems advantageous and disaffirm that which dis-

pleases him. To allow such conduct would make all corporate relations uncertain, subject to attack, and a constant source of litigation.

It was said in *Bauersmith v. Extreme Gold Mining Co.*, 146 Fed. 95:

“But is certainly was known by the directors that in seeking to effect this and other sales, he was acting for the company on authority which proceeded from somewhere, and in accepting the benefit of his services they necessarily committed themselves to the means by which these services were secured. This is not to impute or presume knowledge, is not that they might or ought to have known and are therefore to be held as though they did. But, having taken advantage of what had been done in their behalf, they could not afterwards refuse to be bound thereby, a doctrine which is abundantly sustained by the authorities (citing authorities). As said by Sharswood, J., in *Mundorff v. Wickersham*, 63 Pa. 87: ‘Thus where a party adopts a contract which was entered into without authority, he must adopt it altogether. He cannot ratify the part which is beneficial to himself and reject the remainder. He must take the benefit to be derived from the transaction *cum onere*.’ * * * While, then, in the case in hand Dr. Chambers may have had no authority to bind the company by written agreement with the plaintiff, as he undertook to do, yet when the board of directors accepted the benefit of plaintiff’s services which were so secured, as they did when they adopted the sale which he had negotiated with Whittaker, they took upon themselves the obligation to compensate him according to the terms of the agreement under which he acted, whether they knew of its existence or not. * * * It was therefore the duty of the directors to inquire and know upon what terms he was acting and to give timely notice if they did not propose to be

bound thereby. They could not play fast and loose with the plaintiff, appropriating his services and refusing the compensation stipulated for, for which those services were obtained."

Acts of Ratification Continuous. The defendant does not rely on one act of the Tanana Company as constituting a ratification. It is interesting to observe that the acts of recognition are numerous, constant and extended over a long period of time. After the minority stockholders' suspicions of July 10th, the cash payment was made and freight was received and paid for by them at the \$60.00 rate. Then we come to September 12th, when defendant Bain read the contract to all the members. (343). After that time the Tanana Company continued to pay without protest freight money to this defendant at the \$60.00 rate as follows:

September 25	\$3500.00
September 28	1900.00
October 5	3500.00
October 17	2500.00
October 23	1000.00

(See freight bills, Exs. D, E, F, G, H, I & J). These payments are itemized in plaintiff's Exhibit 42. All of these payments were voluntarily made without protest.

Now pass to the Tanana meeting of January 1, 1907, at which all the stockholder-directors were present, and the proceedings of which meeting were approved by them all. Passing for the time being the effect of the releases of Bain and Struthers from this action as working a dismissal as against

the defendants, which is discussed under a separate head in this brief, your Honors will recall that at that meeting it was unanimously resolved to wind up the affairs of the Tanana Company and to place the "sole and exclusive charge" of its affairs for the purpose of liquidation in Bain and Livingston. If Bain had been a conspirator, if he had defrauded this corporation out of assets worth several hundred thousand dollars, and had wrecked the corporation, as alleged in the complaint, why should the stockholders, including these two minority men, Bishoprick and Dwyer, ratify his action and give him unlimited authority in closing the corporate affairs. If they held him in such ill repute, was it legitimate, to thus hold him out, together with Livingston, as authorized to settle any corporate matter? It has been decided that where the affairs of a corporation are placed in the hands of certain officers for the purpose of dissolution, that the authority of those in charge is practically unlimited. They may even exchange *all the assets* of the corporation *for stock in another corporation*. The selling corporation is bound by their action.

Metcalf v. American School Furniture Co.,
122 Fed. 115.

McCutcheon v. Merz Capsule Co., 71 Fed. 787.

With this delegated authority in Bain and Livingston, we think it could not be contended that they could not compromise or dismiss this suit. They could likewise ratify or acquiesce in the con-

tract of July 10th, and this ratification would be binding on their corporation.

In August 1907 a payment of \$1000.00 was made to the Tanana Company *through these properly authorized officers*. It was contended at the trial that the acceptance of this payment was unauthorized; that these two minority stockholders did not know of the thing; that the officers had acted fraudulently in accepting payment. All of these contentions are immaterial. Whatever cause of complaint these minority men may have against *their own officers* does not concern the defendant. A payment made to a corporation through the officers entitled to receive it, is payment to the corporation. It cannot be urged by the receiving corporation that its officer misappropriated the fund.

In *Love v. Export Storage Co.*, 143 Fed. 1 it was held that where a corporation received the proceeds of notes which were placed to its credit with the plaintiff bank by means of certain transactions conducted by its president, by which he warehoused the corporation's property, and pledged the warehouse receipts to secure the discounts, and thereafter such proceeds were checked from the bank in its name by the president and treasurer, as he was authorized to do, the corporation was estopped to deny that the president had no authority to conduct such transaction. In the *Love* case, at the time the corporate action occurred, one Corkran was both president and treasurer. It was contended

that he had no power to make warehouse arrangements with the storage company and to pledge the warehouse receipts without authority from the board of directors. The court held that the question of authority was not open because the company had received the fruits of the transaction:

“The fact that thereafter Corkran may have diverted the proceeds from the company to his own private use in no way affected the prior fact that the company received those proceeds from the appellee bank.”

And the act relied upon as a ratification of the prior contract may be performed, and will be binding upon the company, even *after suit started questioning the validity of the contract*. *Macon D. & S. R. Co. v. Shailer*, 141 Fed. 585, in which it was said:

“Now in this case it appears by the record that *since the bill was filed* and before hearing in the circuit court, at an annual meeting held of February 20, 1905, after full report and discussion, the stockholders of the Improvement Company, by a large majority in number and stock, voted down the motion to disapprove the sale complained of and instead voted to ratify and approve the same;” and the court in that case quoted with approval the language of Mellish, L. J., in the case of *McDougal v. Gardiner*, 1 L. R. Ch. Div. 13, as follows:

“In my opinion if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate

end of which is only that a meeting has to be called and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to, and that if it is a thing which the majority are the masters of the majority in substance shall be entitled to have their will followed. If it is a matter of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly, and that, as I understand, is what has been decided by the cases of *Mozly v. Alston* and *Foss v. Harbottle*."

Tender. The complaint makes no offer to put the parties in statu quo or to return the consideration received by the Tanana Company. The action is one at law in replevin for the return of the boats and damages for the detention. No tender of the amount so received by the Tanana Company was ever made our client; there has been no demand for the surrender of the boats. (536). Plaintiff in its brief offers to credit the consideration received by it, on *any damages* it may recover from the defendant.

Opponents cite various authorities which have no application to the case at bar. These authorities hold that where a *release* has been obtained through fraud, a tender is not a condition precedent to maintaining a suit upon the original cause of action. It must be remembered that we are dealing in the instant case with the transfer of corporate assets by officers who it is claimed exceeded their authority. The corporation itself received the consideration, which remained in the corporate treasury.

There is no evidence that any of the funds paid by the North American Company to the Tanana Company were misappropriated. The plaintiff concedes that some restoration is necessary, but says: "If we are successful in this lawsuit in two things, (a) the return of the boats, and (b) the recovery of damages, we are willing to allow an offset on the damages thus recovered."

Suppose the damages found by a jury were far less than the amount of the consideration received, no offset would be possible. The plaintiff intends to give up nothing unless it is successful in its demands.

Is this offer of restoration of the benefits received sufficient? In *Alaska & Chicago Commercial Co. v. Solner*, 123 Fed. 855, Your Honors held it was not:

"Appellant contends that in a suit of this character a tender before suit is not necessary; that an offer in the bill to make the tender is all that is required. The authorities are not uniform upon this point, but conceding, for the purposes of this opinion, that appellant's contention, as a general proposition, is correct, yet it is apparent that the offer as made in the bill is wholly insufficient. The original bill of complaint filed September 15, 1901, did not contain any averment offering to return the purchase price of the property. The first amended bill, filed September 2, 1902, did not make a sufficient offer. In the second amended bill, filed at the close of the testimony, the complainant alleged:

"That prior to the commencement of this action and subsequent to the alleged purchase above

mentioned the plaintiff offered to repay and tendered to the defendant the said sum of \$5,000 in legal tender money of the United States, which offer of repayment and tender the said defendant then and there refused to accept, and at all times subsequent thereto has so refused, and now refuses, to accept, and that the plaintiff at all times since said tender and since said alleged sale has been ready and willing, and has offered, and hereby offers and tenders, to defendant a credit of the amount paid by said defendant for said property, to-wit, the sum of \$5,000, with legal interest thereon, may be allowed as a credit in any judgment rendered herein.'

"This offer was not a sufficient tender. It was not absolute. Moreover, it was not bona fide. It was neither authorized nor sanctioned by the corporation, and must be treated solely as the act of Heinze, made without authority. In any event, it was only a conditional tender, depending entirely upon a judgment being rendered in favor of the corporation for damages. The tender must be without qualifications or conditions.

"In *Kelley v. Owens*, 120 Cal. 502, 507, 47 Pac. 369, 370, 52 Pac. 797, the court said:

" 'It is undoubtedly the general rule that there can be no rescission of an executed contract upon the ground of fraudulent misrepresentation without restoration, before suit by the party seeking to rescind, of everything of value which he had received from the other party under the contract, or a bona fide offer to restore.' "

See also *Jenson v. Toltec Ranch Co.*, 174 Fed. 86 C. C. A., 8th Cir.

This branch of the law is so well settled and the *Solner* case on the facts involved so analogous

to the case at bar that further citation would only prove burdensome to the Court.

Effect of Their Releasing Bain and Struthers.

The theory of the complaint is that the defendant obtained the boats through a fraudulent scheme between Bain, Struthers and Isom. Our opponents argue that the evidence sustains this theory. They must then be content with the application of rules in harmony with their theory of the facts. Now, they argue that the release of Bain and Struthers in the present suit did not operate to release us also, because Bain and Struthers were not necessary parties to this action. This last we concede. A party suing in tort may indeed choose one, a few, or all of the wrongdoers, but it does not follow that because he may sue one or all that he may *release* anyone. This is a totally different question. He has the privilege not to sue those whom for any reason he finds it difficult or not worth while to pursue, but the law gives him no option to discharge one from his claim and yet hold the others. The reason for this is that when he releases or discharges any of the wrongdoers (and this without regard to whether they have already been joined in the suit or not) he acknowledges satisfaction of his injuries, and the law which permits him to sue whom he will among the wrongdoers does not give him the option to collect more than once. It is as if he recovered a judgment against one and not against others,

and collected his judgment. He could not, even if the liability be regarded as entirely several and not as joint and several, collect again through any of the others.

The court will notice that the instrument in regard to Bain and Struthers is not merely that the suit will be dismissed against them, but that the claims against them are discharged.

The authorities are plain that the discharge of one tortfeasor is a discharge of the others, and they are equally plain that persons effecting a fraudulent scheme are tortfeasors.

In the case of *Parsons v. Hughes*, 9 Paige Ch. 591 (N. Y.), a partnership was defrauded by the defendant with the co-operation of one of the co-partners. The co-partner was released from liability by plaintiff who nevertheless sought to recover from the other defendants. Held that release of the co-partner caused plaintiff to lose his remedy against defendant.

In *Farmers' Savings Bank v. Aldrich*, 133 N. W. 383 (Iowa), the plaintiff bank for a consideration released from liability certain brokers who had participated with the defendants in a misappropriation of funds by plaintiff's cashier. The defendants and the brokers had received the funds with knowledge of their misappropriation, and had used them in speculation. It was held that the release of the brokers discharged defendants.

Reynolds v. New York Trust Co., 188 Fed. 611, 1st C. C. A. The partnership of Gay & Co. converted bonds belonging to the complainant. *Held*, the filing and allowance of a claim against the bankrupt partnership estate barred a claim against the bankrupt estate of Gay, the president of the partnership, since the diversion of complainant's property by Gay and the partnership was a joint tort, or joint and several at complainant's option, and the allowance of a claim against one barred a claim against the other; and this result was not affected by the fact that here the complainant had waived the tort and elected to hold the partnership and Gay as on an applied assumpsit for the value of the goods.

See also:

Clabaugh v. Southern Wholesale Grocers' Ass'n., 181 Fed. 706, Circuit Court (Ala.)

Moorehouse v. Yeager, 71 N. Y. 594.

Mooney v. City of Chicago, 88 N. E. 194, (Ill.). This citation is not a case of fraud, but is illustrative of a great number of cases of injury caused by the concurrent wrongdoing of two or more persons.

The cases cited by our opponents are in no way at variance with the above conclusions.

The case of *Gilbert v. Finch*, 66 N. E. 133, (N. Y.), upon which they principally rely, was a case where directors of the Commercial Insurance Company had paid \$35,000 of the company's funds to

the incorporators of the Maine Insurance Company in consideration of the transfer of all the incorporators' right in the Maine company. Each company became insolvent and the receiver of the Commercial Company sued the incorporators of the Maine Company for the money received. They settled this suit by paying \$25,000 and obtained a release, the receiver expressly retaining his rights against the directors of the Commercial Company. The Appellate Division, whose opinion is reported in 76 N. Y. Sup. 143, held that the defendants and the incorporators of the Maine Company were not joint tort feasons, and reached this conclusion on the ground that the incorporators of the Maine Company committed no wrong in resigning their offices in favor of the defendants. However, since the money which they received belonged to the Commercial Company and they gave no consideration, the Commercial Company was entitled to recover it back in an action for money had and received. (p. 147). The lower court emphasizes the good faith of the parties. The *court of appeals*, however, seems to have taken a different view of the question as to whether the defendants and the Maine incorporators were joint tort feasons, *as it expressly assumes* (p. 135) *that they were such*. The court then discusses the much controverted question as to whether a release of the Maine incorporators with an express retention of rights against the defendants operated to release the defendants, arriving at the conclusion clearly opposed to the

weight of authority, that the defendants were not released. It would seem that if the court had not intended to overrule the Appellate Division on the question of joint tort feors, it ought not and presumably would not have laid down a precedent upon this disputed question, when it was unnecessary for it to enter upon a discussion of it. The inference therefore from this case on the question of joint tort feors is distinctly unfavorable to the plaintiff in error.

It is to be noted that the release in the case at bar contained no express reservation of rights against our client.

Counsel for plaintiff in error seek to supply this by parol. Their argument and references to the record on this question tend to prove nothing more than the possibility that some of the signers of the release misunderstood its legal effect. There is no attempt made to show, even by oral testimony, that any express reservation of rights against the N. A. T. & T. Co. was attempted. We submit that even if they had any evidence tending to show such reservation, it would not be competent as against the defendant, since whatever may be the rights of third persons as to varying this instrument, a party to it is bound by its terms. But, however this may be, the weight of authority is decidedly to the effect that reservation of rights against the other tort feor is entirely immaterial. The release of one is his discharge and the discharge of one is a satisfaction of the damages, so the

attempt to keep alive rights against the others is useless.

Flynn v. Mason, 126 Pac. 181, Cal. Ap.

Abb v. Northern Pacific Ry., 28 Wash. 428;
58 L. R. A. 293; 68 Pac. 954.

Farmers' Savings Bank v. Aldrich, 133 N. W. 383, (Iowa).

Louisville & N. R. Co. v. Allen, 65 Southern 8, (Fla.).

And in the case at bar there is a further element that estops the plaintiff in error regardless of the view which the court may take upon the question last discussed. It is well settled that where one has asserted a claim against an alleged tort feisor and has obtained a settlement or has accepted a consideration in consideration of the release of that person from liability, he is subsequently estopped to allege, in order to escape the consequences of releasing a joint tort feisor, that he had no cause of action against the person released.

In *Casey v. Auburn Telephone Co.*, 139 N. Y. Sup. 579, (Appellate Division), plaintiff's intestate was killed by a fall on a defective sidewalk in the City of Auburn. She sued the city and settled for \$100. Her administrator now sues the Telephone Company for the same cause. The court held that an instruction that the release of the city was not a discharge of defendant, if the city was not in fact liable, was erroneous, quoting from

Hubbard v. St. Louis & N. R. R. Co., 72 S. W. 1073, 1074, (Mo.).

“It does not lie in the mouth of such a plaintiff to say he had no cause of action against the one who paid him for his injuries, for the law presumes that the one who paid committed the trespass and occasioned the whole injury.”

The New York court further quotes from the case of *Brown v. The City of Cambridge*, 85 Mass. 474, 476.

“The plaintiff is estopped to say that he had no claim against the water works for the tort, but compelled them to buy their peace by the settlement of a claim that was groundless and therefore malicious, for this would be an allegation of his own wrongful act.”

The Supreme Court of California has well expressed this principle in the case of *Tompkins v. Clay Street Hill R. R. Co.*, 4 Pac. 1165, 1168.

“But one who having commenced an action against another has received money in consideration that the action shall be dismissed, or that any judgment he may recover shall not be enforced, ought not to be permitted to deny that he received the money in satisfaction of a valid demand.”

To the same effect are:

Leddy v. Barney, 2 N. E. 107, (Mass.).

Leither v. Philadelphia Traction Co., 4. L. R. A. 54 (Pa.).

Miller v. Beck, 79 N. W. 344, (Iowa).

The facts of this case bring it squarely within the principle of the foregoing cases. The claim of plaintiff in error was released against Bain and

Struthers. They gave valuable consideration for this in dismissing their suit against the directors of the company who are the moving spirits in this suit. Those directors or the corporation which is their *alter ego* ought not now to be permitted to say that they had no cause of action against Bain and Struthers, though they accepted from Bain and Struthers the surrender of rights presumably valuable as a consideration for their release.

Even if the Court finds that there was no fraud, the release in question is fatal to the claim of plaintiff in error.

The case, when purged of fraud, becomes the ordinary case of an agent exceeding his authority. Upon familiar doctrines of agency Bain then became liable to defendant in error as a warrantor of the authority to sell which he assumed to exercise.

Groeltz v. Armstrong, 99 N. W. 128 (Iowa).

Nelligan v. Campbell, 20 N. Y. Sup. 234 (Supreme Court).

Danser v. Dorr, 78 S. E. 367, (W. Va.).

M'Donald v. Luckenbach, 170 Fed. 434, 440, C. C. A. 3rd Cir.

Plaintiff in error then having released the person to whom defendant in error was entitled to look for reimbursement in case it obtained no rights against plaintiff on account of Bain's exceeding his authority can not now hold the defendant whose obligation, if any, was only secondary.

14 American & English Encyclopedia of Law,
page 1162.

Irons v. Manufacturers Natl. Bank, 36 Fed.
843, (Cir. Ct. of Illinois), affirmed *sub*
nom. Schrader v. Manufacturers Natl.
Bank, 133 U. S. 67, 10 Supreme Court 238;
33 L. Ed. 463.

The Corporation is Bound by the Release.

The circumstances under which this release was executed lead irresistibly to the conclusion that its execution was really corporate action, but that it was withheld from the corporate records through an apprehension of what has actually occurred, namely, that it would embarrass the company's suit against the defendant in error. But even if the corporation did not act in executing this release, there is no one who can raise that objection. The release was signed by all of the directors and stockholders of the corporation at that time, except Bain and Struthers. The corporation itself has no interests to protect apart from those of its stockholders, and if they have all acquiesced in acts which have impaired rights of the corporation, there is no one who is in a position to complain. This is not a case of transferring title or of some other act requiring official and technical execution. It is a case of whether unanimous acquiescence of shareholders and directors works an estoppel. The case of *Gilbert v. Finch*, 76 N. Y. Sup. 143, which plaintiff in error relies on in this connection has no application. That case simply held that directors of the corporation could not pay out its

money receiving nothing in return, and then proceed to ratify their own wrongful acts, and to release themselves from liability. In the case at bar the persons guilty of the wrong, if any, had nothing to do with the release. That proceeded from persons holding the entire remaining interest in the corporation. These persons cannot now be heard to say that the corporation did not release the alleged wrongdoers.

Respectfully submitted,

FREDERICK BAUSMAN,
R. P. OLDHAM,
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Attorneys for Defendant in Error.

CHARLES J. HEGGERTY,
Of Counsel.



No. 3173

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN E. GOODWIN.....Plaintiff in Error,)
-- versus --)
THE UNITED STATES OF AMERICA,)
Defendant in Error.)

BRIEF FOR PLAINTIFF IN ERROR

Filed-----

Clerk of the United States
Circuit Court of Appeals.

THOMAS E. FLANNIGAN,
Attorney for Plaintiff
in Error.

FILED

OCT - 1 1912



IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN B. GOODWIN.....Plaintiff in Error,)
-- versus --)
THE UNITED STATES OF AMERICA,)
Defendant in Error.)

STATEMENT OF THE CASE

During the morning of the fifteenth day of September, 1910 one Alfred Hillpot and Fred Kibbey were found dead in a house in the White Mountain Indian Reservation in Gila County, Arizona.

The Plaintiff in Error, John B. Goodwin, and one William Stewart, were indicted in the District Court of the Fifth Judicial District of the County of Gila, on the

Territorial side of the court, for having murdered them.

A severance was demanded at the trial and each was given a separate trial for the killing of Fred Kibbey; each was found guilty of murder in the first degree and the jury in the case fixed the punishment at life imprisonment in the Territorial prison.

After they had been confined in the Territorial prison for over a year they were again indicted on the United States side of the court, in the same district, on two separate indictments, for the murder of Fred Kibbey and Alfred Hillpot.

At the trial a severance was again had and each was tried in the United States court for the murder of Alfred Hillpot.

On the trial of the case the Plaintiff in Error was found guilty of murder in the first degree for the killing of Alfred

Hillpot and the jury fixed the punishment at death. The co-defendant, William Stewart, was also convicted of murder in the first degree and the jury fixed the punishment at life imprisonment.

From the verdict of the jury and the judgment of the court the Plaintiff in Error took an appeal to the Supreme Court of the Territory of Arizona, from which court the case was transferred to this court for hearing.

ASSIGNMENT OF ERRORS

I.

The court erred in permitting the United States Attorney to ask of the jurors, over the objection of the defendant, the following questions:

"If you were sworn as a juror in a murder case and it appeared to you beyond a reasonable doubt; that you were convinced beyond a reasonable doubt that the defendant was guilty of a murder, and it was particularly atrocious

and brutal kind, have you any views on the subject of capital punishment, or of the death penalty, that would preclude you from bringing in a verdict of this kind ?" (Tr. pg. 21 and similar questions on pages 52, 54, 55, 59, 68, 71, 73, 75 and 83).

II.

The District Attorney, in his closing argument to the jury, made use of the following language:

"Do not let it be said, gentlemen, that you as jurors did not have the nerve to attach the death penalty; because, gentlemen of the jury, this case, if ever there was a case, is one in which it is merited."

To all of which declarations, expressions and arguments of the District Attorney the defendant at the time objected; but his objections were by the court overruled and the defendant at the time excepted. (Tr. pg. 301). This we assign as error.

III.

The court erred in permitting the witness Charles Dean to testify over the ob-

jection of defendant to a conversation had with the co-defendant Stewart regarding the homicide. (Tr. pgs. 262 and 267).

The court erred in permitting the witness Henry Thompson to testify over the objection of the defendant to a conversation had with the Plaintiff in Error regarding the homicide. (Tr. pgs. 279 and 281).

The court erred in refusing to grant the Plaintiff in Error a change of venue, as is shown by the motion and affidavit on file in this case.

The court erred in admitting incompetent evidence over the objection of the defendant.

ARGUMENT

The District Attorney in his examination of the jury repeatedly asked them, over defendant's objection,

"That in a case where it appeared that the murder was particularly brutal

and atrocious in its nature if they would hesitate to inflict the death penalty."

This was error, and the court should have sustained defendant's objections to the questions as improper. The question properly put is:

"Have you such conscientious opinions against the infliction of the death penalty that would preclude you in finding the defendant guilty where the punishment might be death?" (R. S. of Ariz. page 1340).

The District Attorney asked the proper questions of some of the jurors: (Tr.pgs. 25, 28, 34, 36, 38, 39, 40 and 41). But the ruling on the question as to a murder of a particularly brutal and atrocious kind was only for the purpose of getting before the jury at the outset that the trial of Plaintiff in Error was for murder characterized as "brutal and atrocious".

When defendant objected to the question as improper, the court gave as its reason for overruling the objection, as follows:

"I think the prosecuting attorney is entitled to ask the juror with reference to his state of mind for the purpose of gaining information upon which to base peremptory challenge. It is not a ground of challenge for cause; but for the purpose of stating-----of ascertaining the state of mind of the juror for the purpose of exercising a peremptory challenge I think the question is within the proper limits." (Tr. pg. 70).

We do not think that the reason assigned relieved the minds of the jury from being impressed by the question of the District Attorney that the case they were being examined on as to their qualifications was a case of the character designated by the District Attorney. In other words, the court permitted the District Attorney to lay a foundation in the very start, by his examination of the jury, for what he afterwards took advantage of in his closing argument. He was permitted by the court to ask if in a case of an extremely brutal and atrocious kind they would hesitate to inflict the death penalty. To a

certain extent he procured from them a pledge that they would pronounce the death sentence if the case was as he said, and would not hesitate in doing so. Now after laying the foundation, as it were, for his final argument, by placing before the minds of the jury the proposition that under the case as presented by him they would have no hesitancy in hanging the defendant, he then placed the matter up to them in the following words:

"Do not let it be said, gentlemen, that you as jurors did not have the nerve to attach the death penalty; because, gentlemen of the jury, this case, if ever there was a case, is one in which it is merited."

The defendant at the time objected to the remarks as improper, but the court overruled the objection. Yet the court did sustain the objections of the defendant to remarks made by the District Attorney in his closing argument that were not half as deadly and prejudicial to the de-

fendant as were the arguments of counsel which the court refused to sustain defendant's exception to. (Tr. pg. 301)..

When the words were still ringing in the ears of the jury "Do not let it be said, gentlemen, that you did not have the nerve.." the court then and there refused to sustain defendant's objection to the District Attorney's remarks. What further conclusion could or did the jury come to unless it was the belief that the court acquiesced and sanctioned the remarks of the District Attorney and believed with him that they should hang the defendant ? Even admitting, for the sake of argument, that the District Attorney had a right to examine the jury in the manner he did and ask the questions regarding what they would do if certain things were proven to them, we still hold that his closing arguments made the questions error, for he placed the

jury in a position----by practically saying it would be cowardice on their part not to hang the defendant, he placed the jury in a position compelling them to say that they would do certain things and then put the matter squarely before them purely as a matter of "nerve" on their part.

We contend that the District Attorney's statements in closing were a breach of professional and official duty which, upon the defendant's protest, should have been rebuked by the court and the jury instructed to disregard it. The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and the court by so doing committed a grave error manifestingly tending to prejudice the defendant with the jury, and which, there-

fore, was a proper subject for exception; and having been duly excepted to, should entitle defendant to a new trial.

All courts agree that it is the duty of the presiding judge, either of his own motion or upon the request of the opposing party or his counsel, to interpose and check the party or his counsel in any improper and prejudicial line of argument.

The only question regarding the argument of the District Attorney in this case for this court to decide is: Was the argument of the District Attorney improper, and was it prejudicial to the defendant?

In closing we desire to particularly call the attention of the court to the transcript of the record for the general facts in this case, which in our judgment renders the verdict of the jury and the judgment of the court, imposing the death penalty, unmerited.

The law does not contemplate or provide
for such a result from such a state of
facts.

Respectfully submitted,

Thomas E. Flannigan

Attorney for Plaintiff in Error.

United States Circuit Court of Appeals For the Ninth Circuit

John B. Goodwin,

Appellant.

vs

The United States of America,

Appellee.

BRIEF OF APPELLEE

ARGUMENT OF APPELLEE

At the outset, I am confronted with the title of the cause as it appears in the appellant's brief wherein John B. Goodwin is names as *Plaintiff in Error* and the United States of America as *Defendant is Error*. As I understand the situation, this is not a proceeding *in error* at all. I hesitate to base a motion to dismiss, on the ground that no petition in error has been filed, or citation served, for the reason that it is possible that the counsel for John B. Goodwin has inadvertently, in the title of the cause, referred to the parties as plaintiff and defendant in error. However, I take the liberty of directing the attention of the Court to the title of the cause, and now submit, without argument, the question of whether or not the proceeding in this Court should be dismissed. In any event, as my understanding is that this pro-

ceeding is an appeal, I shall hereafter refer to the parties as "John B. Goodwin, Appellant," and "The United States of America, Appellee."

An examination of the statement of the case as it appears in the brief of the appellant, discloses that appellant asserts that he, together with one William Stewart, in the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Gila, the said court being a territorial court, was tried, convicted and sentenced for the murder of one Fred Kibbe, and that appellant was confined under such sentence in the Territorial Prison for about a year prior to the time when the indictment in this case was returned. It is not clear to me why the appellant inserts this allegation in his statement of the case, as he does not assign as error the indictment, trial, or conviction in this particular case. He therefore, of course does not contend that there was anything improper or irregular in the fact that he was indicted and convicted in the case now before this Court. The indictment in the Territorial Court charged him with the killing of one Fred Kibbe, while in the District Court of the Fifth Judicial District of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, he was charged with the murder of another person, to-wit, Alfred Hillpot. It is apparent, therefore that no plea of jeopardy, or former conviction, could avail the appellant. As is well known to this court, under the judicial system in vogue in the Territory of Arizona before its admission as a state, there were no United States courts, but the Territorial Courts acted with superimposed powers, as indicated in the title of the court last above mentioned in which this case was tried. In any event, the Territorial Court had no jurisdiction to try the defendant for the murder of Kibbe, for the reason that said murder occurred upon the White Mountain Indian Reservation, and the killing was done by the appellant, John B.

Goodwin, who is not an Indian. The facts in this case are practically identical with those in the case of *Ex Parte Wilson*, 140 U. S. 575, 35 Law Ed 513, in which the exclusive jurisdiction of the Territorial Courts, acting as United States Courts, over crimes committed by persons other than Indians within the limits of Indian reservations in territories was fully sustained. *Ex Parte Wilson* was a case arising in the same county in which the murder in the case at bar was committed. Wilson was indicted, tried, convicted, and sentenced to suffer death in the District Court of the Second Judicial District of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, Gila County at that time being in the Second Judicial District of the Territory of Arizona. The murder was shown to have been committed within the limits of the White Mountain Indian Reservation, the same as in this case. Wilson prosecuted a writ of habeas corpus to the Supreme Court of the United States, and Mr. Justice Brewer, in a remarkably able opinion, discussed the law pertaining to the matter of jurisdiction, that being the ground upon which the petitioner sought to sustain his application, and that learned Justice concludes his opinion with this remark:

“It follows that, as the Circuit Courts of the United States have jurisdiction over the crime of murder committed within any fort, arsenal, or other place within the exclusive jurisdiction of the United States, so, prior to 1885, the District Courts of a territory had jurisdiction over the crime of murder committed by any person other than an Indian upon an Indian reservation within its territorial limits and that such jurisdiction has not been taken away by the legislation of that year.”

There has been no legislation on this subject since that referred to in the opinion of Mr. Justice Brewer just quoted. Other authorities to the same effect are:

United States vs. Bridleman, 7 Fed. Rep. 894;
 United States vs. Ewing, et al., 47 Fed. Rep.
 809;

In re Gen-Shay-ee, Petitioner, 130 U. S. 343, 32
 Law Ed. 973;

A reading of these authorities shows that the law is absolutely settled that the Territorial courts, acting as United States courts, had, while Arizona was a territory, the sole and exclusive jurisdiction of the crime of murder committed within the limits of Indian reservations in said territory by persons other than Indians.

The appellant directs his entire argument to a discussion of the matters set forth in Assignment of Errors I and II, and I therefore presume that he does not deem the other assignments of error of sufficient importance to take up the time of the Court, by presenting any remarks to sustain them.

As the appellant has argued Assignment of Errors I and II, jointly, I shall follow his example and discuss them in the same manner.

Bitter complaint is made because the United States Attorney, in examining jurors on their voir dire, asked the question substantially, as to whether or not the juror, if the evidence in a murder case convinced him beyond a reasonable doubt that the defendant was guilty of murder and that the murder was of a particularly atrocious and brutal kind had any views on the subject of capital punishment, or the infliction of the death penalty, which would preclude the juror from returning a verdict of guilty and affixing thereto the death penalty. As the learned judge who tried the case pointed out, (Page 70 Trans. of Evid.), the United States Attorney was acting clearly within the legitimate scope of examination of this nature, seeking to discover the condition of mind of the juror, so that he might have proper basis upon which to intelligently exercise his peremptory challenges. I do not believe that it is necessary to cite

authorities to sustain a self-evident proposition. It is quite apparent that the appellant has failed to discover any authorities to sustain his view, otherwise he would have cited the same in his brief. No attempt whatever was made, by the United States Attorney, to base a challenge for *cause*, upon any response elicited by any such question. The record will show that, whenever the United States Attorney challenged any juror for *cause*, upon the ground of conscientious scruples against capital punishment, the question, which drew forth the objectionable answer, was carefully framed under and was in compliance with the statute then controlling such a condition, (Sub-division 14, Section 910, Penal Code, Revised Statutes of Arizona, 1901).

That the murder for which the appellant was on trial was of a particularly brutal and atrocious kind, must be conceded by anyone familiar with the facts in this case. The transcript of evidence shows, not only beyond a reasonable doubt, but absolutely beyond any question whatsoever, that the appellant, together with one William Stewart, for some time prior to the date of the murder, had been living on a small ranch, in the wilds of the White Mountain Indian Reservation, some fifty miles from Globe, Arizona. That shortly before the killing, Alfred Hillpot and Fred Kibbe, two young men from Globe, Arizona, went on a hunting trip and were invited by appellant and Stewart to stop at the ranch, accept of their hospitality, and make the ranch their headquarters on their hunting expedition. The testimony is such that it will necessarily convince anyone reading it that, just after dark, on the day after Kibbe and Hillpot had so accepted the apparently friendly invitation of appellant and Stewart, and immediately after all four had eaten supper in the house where appellant and Stewart were living, Fred Kibbe, while resting after dinner, smoking his pipe, with his elbows carelessly placed behind him on a table, he being seated in a chair without a back, was, without notice or warning whatsoever, shot down, in absolute cold

blood, the weapon used being an extra size forty-five six shooter, the bullet entering the right corner of the left eye, penetrating the inter-cranial cavities and making its exit, approximately on a level with the entrance wound, about the center of the back of the head. At practically the same moment, Alfred Hillpot, who had been reclining on the floor, with his head upon a saddle, also resting after dinner and smoking his pipe, was shot twice with a 30-40 Winchester rifle, once through the left shoulder, the other wound being from the left side of the body, about six inches above the hip, to the right shoulder, the ball passing behind the heart, and neither wounds being instantaneously fatal; that after Hillpot had been so desperately wounded, and while lying upon the floor absolutely helpless from the effects of the gunshot wounds, he was beaten over the head with the stock of the 30-40 Winchester rifle with such violence and brutal strength and determination that his brains were dashed out and spattered over the walls above his head to a height of six to seven feet; and so terrific was the impact of these blows and the persistency with which they were delivered, in the cruel blood lust of his assailant, that the stock of the rifle was split in twain and knocked free from the rifle itself, and there lay in pieces upon the floor, entirely apart from the rifle when the bodies of these unfortunate young men were discovered. And not content with this most awful and shocking murder, for surely the unfortunate Hillpot was absolutely dead after his brains had been dashed out, his assailant deliberately stabbed the corpse with a large hunting knife, sinking it into the throat of the body behind the breast bone and about an inch to the left of the median line, down into the aorta and there twisted the knife round and round again, until the hole in the neck of the body, caused by the most awful atrocity, was several inches in diameter.

It is not my purpose to discuss, in any way, the evidence in this case, and the above statement, ghastly, gruesome and almost incredible in its ferocity, is only made to show this Court that the words "particularly brutal and

atrocious", which appear in the question to which such vigorous objection is made, were fully justified by the facts which later appeared in evidence. This being a capital case in which the appellant is under sentence of death, I have no doubt whatever that the judges of this honorable Court will carefully read the testimony as it appears in the Transcript of Evidence, and I am content to rest, so far as the above statement is concerned, upon the opinion which they will draw therefrom.

The appellant, in his second assignment of error, protests that it was grossly improper and a violation of the professional and official duty of the United States Attorney, which should have been rebuked by the Court and the jury admonished to disregard it, for the prosecutor to have used the language quoted in said assignment, that is to say:

"Do not let it be said, gentlemen, that you as jurors, did not have the nerve to attach the death penalty; because, gentlemen of the jury, this case, if ever there was a case, is one in which it is merited."

I do not for a moment imagine that this Court will hold that it was error of the slightest kind for the United States Attorney to have used this language in his argument. After diligent search through many of the cases relating to improper conduct and remarks of District Attorneys, I have been unable to find one single court which has held such language as error, or even criticized the prosecutor for its use. Again, the appellant has been unable to find any authority whatsoever to sustain his position.

The first two paragraphs in Assignment of Error III are entirely too vague to justify any consideration by this Court, but the record will show that the conversations therein referred to were had in the immediate presence of the appellant, in his hearing, and with his attention fully directed to the entire conversation. That such evidence is

admissible has been held so often that I would deem it an idle waste of the valuable time of this Court to cite any authorities, although there are a forest of them.

The third paragraph in Assignment of Error III relates to the refusal of the Court to grant a change of venue. This is a matter almost entirely within the discretion of the Trial Court, and an examination of the motion and affidavits attached thereto and filed in connection therewith, will convince this Court that the learned judge who presided at the trial of this case in no way abused his discretion, but, on the contrary, was absolutely right in denying the motion.

The fourth paragraph in Assignment of Error III is so general and vague in its terms that surely the Court will not consider it.

The appellant was fairly convicted of one of the most ghastly, cold blooded and atrocious murders that ever stained the fair name of Arizona; a jury of his own selection found him guilty beyond all reasonable doubt, upon evidence which overwhelmingly proved that he was the perpetrator of this awful crime; he was represented by able counsel, none more gifted or experienced in the state; his every right was safeguarded; the jury unanimously said, upon their oaths, that he merited and should suffer the death penalty.

The judgment of the lower court should be affirmed.

Respectfully submitted,

J. E. MORRISON,
United States Attorney for the District of Arizona.

No.

2185

4

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

THE BARQUE "BABIN CHEVAYE,"

GEO. H. C. MEYER, H. L. E. MEYER, JR., J. W.
WILSON and JOHN M. QUAILE, partners doing
business under the firm name of MEYER, WILSON
& COMPANY.

Libelants and Appellants,

vs.

BUREAU FRERES & BAILLERGEAU,

Claimants and Appellees.

Appeal from the District Court of the United
States for the District of Oregon.

TRANSCRIPT OF RECORD.

FILED

SEP 25 1912

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Libelants and Appellants,

vs.

BUREAU FRERES & BAILLERGEAU,
Claimants and Appellees.

**Names and Addresses of Proctors
upon this Appeal:**

For the Appellants:

Wood, Montague & Hunt, Spalding Bldg.,
Portland, Oregon

For the Appellees:

Snow & McCamant, Electric Bldg., Portland, Oregon

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*In the Circuit Court of the United States for the
District of Oregon.*

BE IT REMEMBERED, That on the 16 day of October, 1909, there was duly filed in the District Court of the United States for the District of Oregon, a Libel, in words and figures as follows, to wit:

[Libel.]

*In the District Court of the United States for the
District of Oregon.*

THE BARQUE "BABIN CHEVAYE,"
GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.
W. WILSON and JOHN M. QUAILE, part-
ners doing business under the firm name of
Meyer, Wilson & Company.

Libellants.

In Admiralty.

To the Hon. Chas. E. Wolverton and the Hon. Robert S. Bean, District Judges of the United States for the District of Oregon:

NOW COME the libellant herein by Williams, Wood & Linthicum, their proctors, in a cause of suit, civil and maritime, upon a contract, and articulately allege as follows:

ARTICLE I.

The libellants herein, George H. C. Meyers, H. L. E. Meyer, Jr., J. W. Wilson and John M. Quaile, during all the times in this libel mentioned were and now are partners in business in Portland, Oregon, and Liver-

pool, England, and elsewhere under the firm name of Meyer, Wilson & Company.

ARTICLE II.

The barque Babin Chevaye is a French barque, owned by Messers. Bureau Freres & Baillergeau, and is of 1930 tons register.

ARTICLE III.

Heretofore, to wit, December 16th, 1908, the libellants herein chartered said barque by charter party in writing, wherein and whereby, among other things, it was agreed by the said barque and her owners that the said barque was tight, staunch, strong, and in every way seaworthy and fitted for the voyage she was about to undertake, and that she should proceed to load at Antwerp, Belgium, and to be properly stowed and loaded so that she should be in every way seaworthy and of good general condition, and thence to proceed with general cargo to Portland, Oregon.

ARTICLE IV.

Thereafter and in accordance with the terms of said charter party, the said barque was loaded by these libellants at Antwerp with a general cargo, to wit, pig iron, steel plates, structural steel, coke, cement and general merchandise.

ARTICLE V.

Said cargo was stowed under the supervision of the captain of said barque, but was so negligently and improperly stowed as to render the said ship unseaworthy, to wit, too great a weight was stowed in the

lower hold in proportion to the weight stowed in the 'tween decks. The total weight of cargo was, to wit, 2990 tons, of 1000 kilos each which was distributed as follows, to wit, in the lower hold 2136 tons, and in the 'tween decks 854 tons, whereas by the rules and principles of good seamanship and by the practice and experience of the barque Babin Chevaye there should have been stowed in the 'tween decks not less than 1100 tons; that the improper distribution of weight by stowage of cargo as aforesaid caused said barque to be stiff and unseaworthy, and caused her to labor unnecessarily and excessively in ordinary weather, and in bad weather caused her to open her seams and strain and open her decks, and otherwise to become unseaworthy and let in water upon her cargo.

ARTICLE VI.

Thereafter, to wit, February 16, 1909, the said barque so improperly stowed and unseaworthy proceeded on her voyage to Portland, Oregon, by way of Cape of Good Hope and Hobart, Tasmania, arriving at Portland, Oregon, to wit, August 23, 1909.

ARTICLE VII.

On discharging cargo at Portland, Oregon, it was found that said cargo was damaged by sea water as follows, to wit: The steel was damaged by rust and pitting in the sum of \$1194.00, and the cement was damaged in the sum of \$4940.00, all of which damage was directly caused by the unseaworthiness of said barque as aforesaid, due to improper distribution and stowage as aforesaid.

ARTICLE VIII.

That the said barque was also unseaworthy and said damage was also caused by the fact that her decks were not in a tight, seaworthy and proper condition at the time she entered upon said voyage.

ARTICLE IX.

The said barque is now lying in the Port of Portland, District of Oregon, and the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libellants pray that a warrant of arrest may issue out of this court according to the rule of procedure in admiralty, seizing and arresting the said barque Babin Chevaye, and that due monition and citation may issue according to the admiralty process of this Honorable Court requiring the owners and all other persons interested in said barque to appear before this Honorable Court on a day certain and make answer herein, and for the sum of \$6134, and costs, and for such other and further and different relief, according to the rules and principles of admiralty as to this Honorable Court may seem meet.

WILLIAMS, WOOD & LINTHICUM,

Proctors for Libellants.

Alfred Tucker,

For Meyer, Wilson & Co.

Sworn and subscribed to before me Clerk of the District Court, this 16th day of October, 1909, at

Portland, Oregon.

[Seal.]

A. M. CANNON,

Clerk.

By J. W. Marsh,

Deputy.

[Endorsed]: Libel. Filed October 16, 1909.

A. M. CANNON,

Clerk.

By G. Clark,

Deputy.

And afterwards, to wit, on the 20 day of April, 1910,
there was duly filed in said Court. an Answer, in
words and figures as follows to wit:

[Answer.]

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.
W. WILSON and JOHN M. QUAILE, part-
ners as MEYER, WILSON & COMPANY,
Libellants,

vs.

THE BARQUE BABIN CHEVAYE,
Defendant
BUREAU FRERES & BAILLERGEAU,
Claimant

To the Honorable Charles E. Wolverton and the
Honorable Robert S. Bean, District Judges of the
United States for the District of Oregon :

The answer and claim of Bureau Freres & Bailler-
geau, owners of the above defendant barque Babin

Chevaye to the libel of Meyer, Wilson & Company, doth allege and deny as follows:

ARTICLE I.

Claimant admits the allegations contained in Articles I., II., III. and IV. of the libel.

ARTICLE II.

Claimant denies each and every allegation contained in Article V. of the libel, except that claimant admits that the cargo was stowed under the supervision of the Master or Captain of the defendant Barque.

ARTICLE III.

Claimant denies each and every allegation contained in Article VI. of the libel, except that claimant admits that the defendant barque proceeded on her voyage on the 16th day of February, 1909, by way of Hobart, Tasmania, and that she arrived at Portland, Oregon, on the 23rd day of August, 1909.

ARTICLE IV.

Claimant admits that the cargo on arrival at Portland was found to be damaged to some extent, but claimant is not advised as to the extent of such damage, and therefore, denies the allegations contained in the Seventh Article of the libel and asks that libellant make proof of the same. Claimant particularly denies that the damage to the steel and flat iron carried by the vessel was due to sea water, and claimant avers that the said damage was due to the exposure of said steel and flat iron to the weather prior to the time when the same was delivered to the de-

fendant barque for carriage. Claimant denies that any portion of the damage averred in the Seventh Article of the libel was caused directly or otherwise by the unseaworthiness of the defendant barque or was due to an improper distribution or stowage of cargo therein.

ARTICLE V.

Claimant denies each and every allegation contained in the Eighth Article of the libel.

ARTICLE VI.

Claimant admits that the defendant barque was lying in the Port of Portland, District of Oregon, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court at the time when the libel was filed, but claimant denies that the allegations of the libel are true except as hereinbefore specifically averred.

For a further and affirmative defense to the matter set forth in the libel, claimant avers:

I.

That it is a corporation organized and subsisting under the laws of the Republic of France, and that it is the owner of the defendant barque; that the voyage referred to in the libel was undertaken by the defendant barque pursuant to a charter party entered into as averred in the Third Article of the libel; that it is provided therein that the defendant barque and its owners should not be liable for any damage sustained by the Act of God, perils of the sea, and accidents of navigation, even when the same should be

occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the ship-owner.

II.

That at the inception of the said voyage on or about the 16th day of February, 1909, the defendant barque was in all respects seaworthy; was properly manned, equipped for her voyage, and supplied with all things needful thereto; that claimant had exercised due diligence to make the defendant barque seaworthy, to properly man, equip and supply her, in this, that claimant caused said barque to be painted, her donkey engine to be repaired, her foremast to be repaired, and the entire vessel to be thoroughly inspected by competent surveyors, whereupon the said barque was found to be in all respects seaworthy, tight, staunch and strong, and properly manned, equipped and supplied for her voyage; that in truth and in fact the said barque at that time was tight, staunch and strong as so reported and found by the said surveyors; that the cargo of the said barque was carefully loaded and stowed and properly distributed between the hold and the 'tween decks of the said barque, and claimant caused the vessel to be duly inspected for the purpose of ascertaining this fact; that the surveyor who made the said inspection was in all respects qualified and competent thereto, and claimant exercised all possible diligence to this end.

III.

That while on her voyage from Antwerp to Port-

land the defendant barque encountered storms of extreme severity; that the weather remained stormy and continuously bad for long periods of time during the said voyage; that for upwards of a month the sea remained rough; the waves were continuously high; the wind remained severe at all times, and during much of the said time blew a gale; that during the said period the defendant barque narrowly escaped shipwreck; that the vessel rolled by reason of the severity of the wind and weather; that the sails were carried away; the masts were strained; the rivets were loosened, and the stanchions were worked; that the door of the chart-room was broken by the waves, and that it was impossible to keep the cargo dry although every effort was put forth by the master and crew of the barque to repair the damage done as speedily as possible. That during the month referred to and also at a later period of the said voyage, by reason of the perils of the sea and the accidents of navigation hereinbefore referred to, certain damage was done to the cargo in despite of the efforts of the master and crew as aforesaid, and the damage so sustained is the only damage received by the said cargo on the voyage from Antwerp to Portland; and the only cause of the same was and is the Act of God aforesaid in the storms, perils of the sea and accidents of navigation hereinbefore referred to.

IV.

Claimant avers that on the arrival of the defendant barque at Hobart, all damage done to the vessel

was again repaired, and that when the said vessel left Hobart it was tight, staunch and strong and in all respects seaworthy, and properly manned, equipped and supplied.

WHEREFORE, claimant prays that a decree of this Court may be passed dismissing the libel of libellants and adjudging that claimant recover its costs and disbursements of and from libellants and their sureties.

SNOW AND McCAMANT,
Proctors for Claimant.

DISTRICT OF OREGON—ss.

I, Wallace McCamant, being duly sworn, depose and say that I am one of the proctors for claimant in the above entitled cause, and that the foregoing answer and claim is true as I verily believe.

WALLACE McCAMANT.

Subscribed and sworn to before me this 30th day of April, 1910.

[Seal.]

JAMES A. RAEISH,
Notary Public for Oregon.

[Endorsed]: Answer to Libel. Filed April 26, 1910.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 12 day of April, 1912, there was duly filed in said Court, an Amended Libel, in words and figures as follows to wit:

[Amended Libel.]

*In the District Court of the United States for the
District of Oregon.*

THE BARQUE "BABIN CHEVAYE."

GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.

W. WILSON and JOHN M. QUAILE, part-
ners doing business under the firm name of

MEYER, WILSON & COMPANY,

Libellants.

In Admiralty.

To the Hon. Chas. E. Wolverton and Hon. Rob-
ert S. Bean, District Judges of the United States for
the District of Oregon:

NOW COME the libellants herein by Williams,
Wood & Linthicum, their proctors, in a cause of suit,
civil and maritime, upon a contract, and by leave of
Court file this amended Libel and articulately allege
as follows:

ARTICLE I.

The libellants herein, George H. C. Meyer, H. L. E.
Meyer, Jr., J. W. Wilson and John M. Quaile, during
all of the times in this amended libel mentioned were
and now are partners in business in Portland, Ore-
gon, and Liverpool, England, and elsewhere under
the firm name of Meyer, Wilson & Company.

ARTICLE II.

The Barque Babin Chevaye is a French barque,
owned by Messrs. Bureau Freres & Baillergeau, and
is of 1930 tons register.

ARTICLE III.

Heretofore, to-wit, December 16th, 1908, the libellants herein chartered said barque by charter party in writing, wherein and whereby, among other things, it was agreed by the said barque and her owners that the said barque was tight, staunch, strong and in every way seaworthy and fit for the voyage she was about to undertake, and that she should proceed to load at Antwerp, Belgium, and to be properly stowed and loaded so that she should be in every way seaworthy and of good general condition, and thence to proceed with general cargo to Portland, Oregon.

ARTICLE IV.

Thereafter and in accordance with the terms of said charter party, the said barque was loaded by these libellants at Antwerp with a general cargo, to-wit, pig iron, steel plates, structural steel, coke, cement and general merchandise, all in good order and condition when received on board.

ARTICLE V.

Said cargo was stowed under the supervision of the owners and captain of said barque, but was so negligently and improperly stowed as to render the said ship unseaworthy, to-wit, too great a weight was stowed in the lower hold in proportion to the weight stowed in the 'tween decks. The total weight of cargo was, to-wit, 2990 tons, of 1,000 kilos each, which was distributed as follows, to-wit, in the lower hold 2136 tons, and in the 'tween decks 854 tons, whereas by rules and principles of good seamanship and by the

practice and experience of the Barque Babin Chevaye there should have been stowed in the 'tween decks to-wit, not less than 1,100 tons; that the improper distribution of weight by stowage of cargo caused said barque to be stiff and unseaworthy, and caused her to labor unnecessarily and excessively in ordinary weather, and in bad weather caused her to open her seams and strain her rivets, stanchions and beams and open her decks, and otherwise to become unseaworthy and let in water upon her cargo.

ARTICLE VI.

Thereafter, to-wit, February 16, 1909, the said barque so improperly stowed and unseaworthy proceeded on her voyage to Portland, rOegon, by way of Cape of Good Hope and Hobart, Tasmania, arriving at Portland, Oregon, to-wit, August 23, 1909.

ARTICLE VII.

On discharging the cargo at Portland, Oregon, it was found that said cargo was damaged by sea water as follows, to-wit: The steel was damaged by rust and pitting in the sum of....., and the cement was damaged in the sum of, all of which damage was directly caused by the unseaworthiness of said barque as in this libel more specifically stated—and libellants have been and are damaged in the sum of to-wit, \$1500.

ARTICLE VIII.

That the said barque was also unseaworthy and said damage was also caused by the fact that her decks were not in a tight, seaworthy and proper con-

dition at the time she entered upon said voyage, and her small hatch into the store-room or sail-room through the main deck was so constructed that it could not be closed at all or made watertight.

ARTICLE IX.

The said barque is now lying in the Port of Portland, District of Oregon, and the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libellants pray that a warrant of arrest may issue out of this court according to the rules of procedure in admiralty, seizing and arresting the said barque Babin Chevaye, and that due monition and citation may issue according to the admiralty process of this Honorable Court requiring the owners and all other persons interested in said barque to appear before this honorable court on a day certain and make answer herein, and for the sum of \$1500 with interest and costs and for such other and further and different relief, according to the rules and principles of admiralty as to this honorable court may seem meet.

WILLIAMS, WOOD & LINTHICUM,

Proctors for Libellants.

Alfred Tucker,

For Meyer, Wilson & Company.

Sworn and subscribed to before me, a Notary Public for Oregon, this 12th day of April, 1912, at Portland, Oregon.

[Seal.]

ERSKINE WOOD,
Notary Public for Oregon.

[Endorsed]: Amended Libel. Filed April 12, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of April, 1912,
there was duly filed in said Court, an Opinion,
in words and figures as follows to wit:

[Opinion of the Court on the Merits.]

*In the District Court of the United States for the
District of Oregon.*

MEYER, WILSON & CO.,

Libellants,

vs.

FRENCH BARK "BABIN CHEVAYE,"

Respondent.

WILLIAMS, WOOD & LINTHICUM, for Libellants.

SNOW & McCAMANT, for Claimants.

R. S. BEAN, District Judge.

In December, 1908, the "Babin Chevaye" was chartered by Libellants to carry a cargo of cement and iron from Antwerp to Portland. She sailed on February 15, 1909, and arrived in Portland via the Cape of Good Hope on the 23rd of August, following. The cargo was received on board in good condition at Antwerp but was considerably damaged from seawater when delivered at Portland. The Libellant, claiming that the damage was due to unseaworthiness of the vessel at the time she sailed by reason of the stowage of her cargo and because her decks were

not tight, brought this proceeding to recover the amount thereof.

The cargo having been received in good condition and damaged while in the carrier's possession, the burden is on the claimant to show that the ship was seaworthy at the time she commenced her voyage and that the damage was caused by perils of the sea or other matters excepted in the charter party, and this I think has been done.

My conclusions in brief are, (1) that the cargo was not improperly stowed. It was distributed in the hold and between decks in the proportion usual in such vessels.

The testimony of the captain and the officers of the vessel is that the stowage did not affect the navigation of the vessel, and that she was not stiff and did not labor unnecessarily. (2) The vessel was seaworthy in her hull when she sailed. The testimony of Bains and Garnuchot, two experts of long experience, shows that she was thoroughly inspected, afloat and in drydock, her decks, seams and calking examined and found in good condition, and in their judgment she was in every way staunch, tight, strong and seaworthy for the voyage, and their evidence is entitled to respect.

The damage to the cargo I think is accounted for by leakage as the result of the severe straining of the ship and the unusual weather encountered on the voyage. From April 18 to about the 1st of July the weather, according to the testimony of the ship's officers, was unusual and extraordinarily severe such as they

had never before experienced in a long sea-service. During that time the sea was very rough and the vessel rolled and strained badly. Her decks were repeatedly flooded with water sometimes up to the rail, and the waves broke over the vessel from one end to the other. One tremendous wave landed on the poop-deck, tore away the wheel-house, carried away two men at the wheel and injured two others, broke in the wall and door of the chart-room letting a large quantity of water down through the staircase into the saloon and apartments aft; some stanchions were carried away and rivets loosened. Such pitching and tossing would be likely to cause the leakage which occurred in this instance and the damage caused thereby is, in my judgment, attributable to sea perils.

It was claimed at the argument, although not stated in the libel that the vessel was unseaworthy at the inception of her voyage because of an opening into the sailroom and storeroom. This opening was used many times a day and it could not have been battened down without great inconvenience to the officers and crew of the vessel, and without seriously interfering with their work in navigating her. It was protected by the poop-deck which was a water-tight deck almost as strong as the main deck and much less exposed to the water. Furthermore there was no evidence that the construction of the vessel was faulty in this respect and I do not think the court should so find without any evidence to that effect.

Upon the whole record, my conclusion is that the

libel should be dismissed and it is so ordered.

And afterwards, to wit, on Monday, the 29 day of April, 1912, the same being the 49 Judicial day of the Regular March, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, et al,

Libellants,

vs.

BARQUE "BABIN CHEVAYE,"

Respondent.

This cause heretofore submitted upon its merits came on regularly at this time for the decision and decree of the Court and thereupon after due consideration, the Court being fully advised in the premises.

It is hereby Considered, adjudged and decreed that the libel herein be and the same hereby is dismissed and that the respondent have and recover of and from the libellant its costs herein taxed at \$310.12.

R. S. BEAN,

Judge.

Dated this 29th day of April, 1912.

And afterwards, to wit, on the 9 day of April, 1912, there was duly filed in said Court, Depositions and Testimony, in words and figures as follows to wit:

[**Testimony Taken in Open Court.**]

*In the District Court of the United States for the
District of Oregon.*

MEYER, WILSON & COMPANY,

Libellants,

vs.

THE BARQUE "BABIN CHEVAYE",

Defendant.

BUREAU FRERES & BAILLERGEAU,

Claimant.

Portland, Ore., Friday, April 5, 1912, 10 A. M.

Mr. WOOD: This is a case in which Meyer, Wilson & Company are libellants, against the French barque Babin Chevaye, and the circumstances as set up in the pleadings are substantially as follows: That she left Antwerp in April, I think it was, of 1910.

Mr. McCAMANT: February 16, 1909.

Mr. WOOD: February 20th, with cement and steel consigned to Meyer, Wilson & Company of this city; that upon arriving here it was found that the steel was badly rusted, and the cement hardened, and damaged by sea water. The ship contends that this was sea peril within the exceptions of the bill of lading, and the evidence taken shows substantially that they had a good deal of heavy weather, and on May 6, 1909, she was pooped by a heavy wave that crushed in her house, and the water went down into the cabin until it was more than mid leg deep, and found its way into the sail room and store-room, and thence into the hold. Now, one of the contentions

that will be made by the libellants is that she was improperly loaded, in that she was too stiff, as the sailors call it, having too much weight in her lower hold, and labored too heavily; another is that her decks were leaking and faulty, and that the sea water went through the leaky decks and damaged the cargo; and third, that there was an open hatch in the store room, through which the water of this great wave went down into the hold, and caused the damage. The burden of proof, I take it, is upon the respondent to show that the damage was due to sea peril, to excuse the fault of the ship, and therefore, I will proceed first, merely to show the extent of the damage, and nothing else. Most of the testimony has been taken in depositions; that is, depositions taken here, and depositions taken in Europe by the respondents.

Mr. McCAMANT: May it please the Court, my view of the law as to the burden of proof, perhaps, does not differ materially from that of counsel for libellant. If they can produce a clean bill of lading, showing that they received this cargo at Antwerp in good condition, and then follow it up with proof that it reached here in bad condition, I admit that that throws the burden of proof on us in the first instance. But then, if we make out a *prima facie* case, showing that the vessel was seaworthy when she left Antwerp, and if we further show accidents of navigation, such as would account for the condition in which the cargo reached here, then, as I understand the law, the burden of proof shifts once more to the libellants, and it devolves upon them to show that the damage to the

cargo was due to some other cause than accident of navigation, or peril of the sea, which we have proved. That is my view of the law. I have some authorities which, at the proper time, I will call to the attention of the Court, if there be any dispute between us as to that. I admit in the first instance, if that is necessary—not for Mr. Wood to show this—that the goods were received in good order at Antwerp, and received in bad order in Portland. As regards the evidence, your Honor, we rely partly on the language of our contract, and partly on the Harter Act. I am not prepared to say to the Court at this time that there will be any difference in the legal responsibilities of the parties whether there was a charter party or not. In other words, I think the effect of this charter party is very closely akin, if not entirely the same, as in the Harter Act in reference to the liability of the ship owner. The charter party contains a guarantee on our part that our vessel was seaworthy; we must show the Court that she was equipped at the time this voyage started, for that charter of voyage and that charter or cargo, and I think we will be able to satisfy the Court upon that point. That will be, perhaps, the most important point in the case. We will be able to show, by the evidence of the men who examined the ship at the time she started, that she was thoroughly overhauled, put in dry-dock, a comparatively new ship, a ship that had been built less than eight years at the time the voyage started. We will show she was thoroughly overhauled, and everything was put in first-class condition; a thorough inspection

was made, and that the vessel was given her rating as a first-class French sailing vessel at the time she started. As regards the stowage of the cargo, the testimony will show, your Honor, they put 954 tons between decks, and 2030 tons in the lower hold. My view of the law, your Honor, is that the only ground on which we can be held liable, are the grounds alleged in the libel, and are only two: One, that the decks of the vessel were not tight at the time she started—that they were leaky decks—and, secondly, that the vessel was stowed so negligently that an excessive amount of cargo was placed in the lower hold, and an insufficient amount of cargo between decks, with the consequent effect of requiring the vessel to labor heavily, rather than ride the waves easily. Now, I think we can show your Honor that there were 954 tons of this cargo—a cargo of a little less than 3,000 tons—954 tons were in between decks, and 2030 tons in the lower hold.

COURT: How was it distributed between cement and iron?

Mr. McCAMANT: There were some of each in both holds. Perhaps I can best indicate my point by passing up to the Court what we claim the evidence will show. There was a considerable quantity of coke in the lower hold, and no coke anywhere else (Showing diagram). This line here, your Honor, is the line which separates between decks and the lower hold. Now, there was a considerable quantity of cement—the largest quantity—in the lower hold.

COURT: 450 tons.

Mr. McCAMANT: Yes. Perhaps there was some more elsewhere in the lower hold. I am not so sure as to that. There was also some cement in the between decks, and some flat iron in between decks—some pig iron in between decks, and some further iron down in the lower hold somewhere here. This is in French, and it has been impartially translated with the red ink notations, but the evidence will probably be to the effect that the general rule, (which we contend is only a most general rule subject to considerable modification and exceptions as to particular ships) is that two-thirds of the cargo should be in the lower hold, and one-third in between decks, and we shall offer evidence to show that that rule is subject to some modification as regards French vessels. The rule primarily is a rule applicable to English vessels, and French vessels carry a heavier superstructure than English vessels; and we shall show the rule subject to some modifications in that respect. And we expect also to be able to show the Court that one vessel with another will differ considerably, and that the man who knows best whether a vessel has been properly stowed is the master of the vessel, who observes how she navigates after she gets to sea; that after a captain has navigated that vessel on one voyage, he knows better than any one else how much should be in between decks, and how much in the lower hold. We shall offer evidence to show that this vessel navigated properly. No trouble with her navigation; we shall further offer evidence to show if there was any departure from the rule, it was so slight

it could have made no appreciable difference in the navigation of this vessel. So much on the question of stowage of the cargo.

Now, as regards the condition of the decks, your Honor, I think we shall be able to satisfy the Court that the decks were perfectly tight at the time the vessel left Antwerp; that there had been a complete overhauling of her, and the only two points of evidence which we think the libellants will be able to seize on to indicate a contrary conclusion are these: One of them is that when a vessel had gotten past the Equator in the southern hemisphere, there was some recaulking of the poop deck. Now, the evidence will show that the poop deck was caulked in this case, as with most French ships, with putty, and that when the vessel experiences the extreme heat of the torrid zone, the putty will crack, and some recaulking will be necessary on the poop deck. Furthermore, the evidence will show the Court, I think, beyond preadventure, that the plan of the ship is such that a little leakage in the poop deck couldn't possibly damage the cargo. The testimony is to that effect. Here is a plan of the vessel, your Honor, which has been identified by deposition, and to which I will call the attention of the Court.

This is the line dividing the lower hold from between decks. This is the upper deck of the vessel. Your Honor will notice how much superstructure there is above the upper deck, which is the point to which I directed the Court's attention a moment ago. The poop deck begins at that point, and runs up to

the rear of the vessel, or nearly to the rear of the vessel, and the officer's quarters are in this part, underneath the poop deck and on the main deck of the vessel. The main deck and the water-tight deck of the vessel is this one which lies under the poop deck. A little leakage on the poop deck would make it inconvenient for the officers around the bedding and quarters where they live, but would not affect the cargo which lies below the main deck, and for the most part below between decks.

Now, as regards the leakage, there is no doubt whatever, your Honor, that this cargo reached here more or less damaged. There will be no dispute on that subject, and no doubt that certain water got down into the cargo. The testimony will show, your Honor, that the ship experienced a voyage of more than usual severity; that when she got in the neighborhood of Cape Horn, or got around Cape Horn—

Mr. WOOD: Cape of Good Hope.

Mr. McCAMANT: No. Cape Horn.

COURT: Most French vessels go by the Cape of Good Hope, don't they?

Mr. WOOD: Good Hope.

Mr. McCAMANT: Good Hope. Then I have been in error, your Honor. The testimony of two seamen whose depositions have been taken is to the effect that they never experienced such weather as the vessel struck on this voyage; not only for the severity of it, but for the continued stretch of bad weather—no let up to it for six weeks. Now, on the 6th of May, 1909, an incident occurred to which Mr. Wood has di-

rected the attention of the Court. The vessel was in the midst of a tremendous storm, and while the vessel was in the trough of the sea, with the bow climbing up out of the trough, and the stern of the vessel pretty well down in the trough of the sea, a tremendous wave—which I think one of the witnesses described as a wave mountain high—came on the ship, and completely engulfed it, and broke in the door of the chart room—this door here, your Honor, and carried two seamen overboard, and disabled two more men, two lives were lost at that time, and the vessel would unquestionably have been wrecked—she was beginning to yield to the force of the wave when these two men at the wheel were either carried overboard or disabled—carried somewhere so they couldn't continue their work, but another man who was on deck and jumped and took the wheel just in time to save the vessel. In fact, the confusion was so great that the absence of these two men was not discovered until some time after—until roll-call was had. There was considerable quantity of water that came in at the time the chart room door was broken. It went down this flight of stairs; then it came down to this compartment called the cambuse journaliere. Now, there was a hatch, which, for the purposes of navigation, was ordinarily kept open, because it was used many times a day. It was the only way of reaching down into the sail room and the store room of the ship; and provisions and various things of that sort which the ship's crew had to have were brought out through that hatch, and also surplus sails as need-

ed from day to day. So, in order to navigate the ship that hatch was kept open. So that we shall contend, your Honor, there could be no liability on the ship for having that open, under the language of the Harter Act, and also because of the language of this charter party,—“Acts of God, perils of the sea, fire * * * Collisions, stranding, and other accidents of navigation mutually excepted, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship owners.” So if it were an error in judgment or negligence, in leaving that hatch open, we think we cannot be held liable for it. But, as a matter of fact, it is impossible, as we think we can show the Court, to navigate the ship and keep that hatch battened down, for it has to be used many times every day, and we shall contend we couldn't anticipate this tremendous accident breaking in this part of the vessel. However, considerable water got down into the hatch at that time, and got down between decks, and run to a considerable extent over the hold. Then six days later, your Honor,—I think that is in the complaint—six days later there was another storm, which was described by the witnesses as being even more severe than this storm of the 6th of May, and the vessel struck cross seas, and labored very heavily. She had navigated in good shape, we think we can show, prior to this time, but she labored very heavily in this second storm, and the weather continued for weeks to be exceedingly stormy, and it was with very great difficulty that opportunity was had to repair the dam-

age from one storm before another came on, and some of the stanchions were torn, and some of the rivets were broken. They were repaired as fast as stress of weather conditions would permit the captain to do, and the vessel went into Hobart town and made more extensive repairs there, and came to Portland experiencing some pretty severe weather from Hobarttown to Portland again. Finally she reached here with her cargo in this condition which the testimony will show.

We claim, your Honor, that the condition of this cargo was due to perils of the sea, and accidents of navigation, for which, under the Harter Act and under this charter party, we are not responsible. That, I think, is our case. I may say to your Honor, that we are more than ordinarily fortunate in that the captain of this vessel has, since this voyage and one subsequent voyage, lived here in Portland, and I am able to have him here as a witness in person, which is much more satisfactory than using his deposition.

Mr. WOOD: In order to accommodate Mr. Bowles, who is very busy, I will call him out of order.

JOSEPH S. BOWLES. A witness called on behalf of the libellant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WOOD):

Q. What is your business?

A. Structural steel manufacture.

Q. Were you in that business in September,

1909?

A. Yes, sir.

Q. Did you take the structural steel that was brought over by the French barque Babin Chevaye, consigned to Meyer, Wilson & Company?

A. Yes, sir.

Q. What was its condition as to rust at the time you received it?

A. It was in very bad condition. Salt water rust eats right into the steel, and in many cases ruins it, which was the condition in this case.

Q. Was it heavily rusted? Give an idea of the degree and character of the rust.

A. Why, I should say that it was in a maximum condition of salt water rust, the worst that I ever saw in all our experience. The pits—where salt water reaches there and isn't taken off, and dries, eats and eventually will eat way down like a pit mark in steel.

Q. Was that the condition of this?

A. That was the condition of the major portion of it.

Q. And you made settlement with Meyer, Wilson & Company by which allowances were made for the damaged condition?

A. Oh yes, we exacted heavy damage.

Cross Examination.

(Questions by Mr. McCAMANT):

Q. Mr. Bowles, how do you know that this was salt water rust?

A. Salt water rust forms rather a bright silky ap-

pearance, and eats into the steel. Fresh water rust simply causes a little brown coating that doesn't eat into the steel.

Q. Wasn't there fresh water rust on this steel too?

A. Yes, on some pieces, but fresh water will not take hold where salt water—

Q. What is that?

A. Fresh water will not take wherever salt water has first been taken; fresh water will have no effect after salt water forms a scale which is hard in itself, just like salt incrustations.

Q. If fresh water rust had started first, and salt water rust came afterwards, that would be still further damaged?

A. I should presume it would.

Q. You couldn't tell, could you, as to whether any fresh water rust on this steel prior to the time the salt water rust got there?

A. No, we don't care—we wouldn't care, because fresh water rust doesn't hurt the steel.

Q. You mean to say if this cargo had come with fresh water rust on every piece of steel, you wouldn't have claimed any damage?

A. No, none at all. All steel is that way.

Q. How much damage were you allowed by Meyer, Wilson & Company?

A. I don't recall the amount. I didn't look up anything. The subpoena came down, and I came right up. The ship arrived something like two years—nearly three years ago. Of course, I could get the

exact record in a few moments. It was quite a considerable amount.

(Witness excused.)

ALFRED TUCKER, a witness called on behalf of the libellant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WOOD):

Q. Mr. Tucker, you are the agent in this city for Meyer, Wilson & Co.?

A. Yes, sir.

Q. What is the name that they go by abroad?

A. Wilson, Meyer & Company.

Q. And were you such agent in September, 1909, when the Babin Chevaye came in?

A. I was.

Q. Did you see that cargo?

A. I did.

Q. What was its condition—both the cement and the steel? Just briefly describe it.

A. Part of the cement was discharged before any of the steel and many of the barrels were damaged by salt water. The hoops were very rusty, showing salt stains on them, and the contents considerably damaged. The steel—

Q. I want the state of the cement first. What did you do now about that cement in the way of reducing the damage and preparing it for market?

A. We separated the good from the bad barrels, and after billing the good barrels, we upended all

those which showed signs of damage. water damage, or where the barrels needed repairing. In this instance we set aside either 1017 or 1071 barrels, as more or less probably damaged, and they were put away to one side, to be looked at later on after the ship had completed the discharge of her cargo at that dock, so as not to take up too much time then. Then we took the steel, delivery of the steel—

Q. No, but didn't you do something to this cement to prepare it for market and reduce the damage?

A. Oh, yes.

Q. Just finish up about the cement.

A. As soon as it was convenient, I had men on the dock to open up some of the barrels, so that I might examine the contents, and I found a large majority of this 1017 or 1071 barrels—or this number which had been set aside, as more or less damaged; they took out the heads from a number of barrels; they cut open a number of barrels so as to get at the actual condition of the contents; and as soon as we had determined upon the number of barrels that were really water damaged, we had men go to work to repack that cement. They would empty the barrels, in many cases, by simply taking out the head carefully, and then emptying the barrel on the dock and rejecting all of the hard or set cement; would repack the good stuff into other barrels or even into the same barrels if they had been sufficiently dried out in the meantime, and in this way we discovered 961 barrels—that in the repacking of this 961 barrels we actually repacked 805, and the others we found we could put in

condition by hammering, that is breaking up; the wood of the barrels had become damp from the water on them in the hold, and that had gone through so that the cement had absorbed a certain amount of moisture, not enough to actually set the cement, but what we call cake it; then all of this cement, either hammered or repacked, we sell as repacked cement—not as good cement.

Q. Sell that at a reduced price?

A. Yes, always. Until the end, the last few barrels, along towards the end—let's see—this cargo arrived the latter part of August, and by the next spring cement was a very scarce article in this market, and we were able to get a considerably better price for what we had remaining of this damaged stuff, all the good having been sold previously, so that the loss was not very severe.

Q. Now, take up the steel. Describe that.

A. The steel came out showing at first—much of it showed only fresh water rust; that is presumably fresh water rust; it might have been caused by sweat; it might have been caused by rain or snow; but as we got down near the bottom of the vessel, the steel all came out in terrible condition. The bars, small bars which were supposed to be all separate, in bundles in other words, came out in such a badly rusted condition that they were all stuck together by the rust. We would find often six or eight or even more bars absolutely stuck together by the rust, and so that they had to be really pried apart. The other kinds of steel, structural steel, angles, channels,—I think there were

no beams in this lot of steel—showed very serious rust conditions; in fact all the channels that were lying with the sides of the channels up—that were stowed that way—just simply had salt water lying right in them, right along. They were in very bad condition; worse practically than anything I think I have ever seen before in that class of goods.

Q. Did you sell this steel or was it for the order of Mr. Bowles?

A. This steel was all sold prior to shipment to the Northwest Steel Company, of which Mr. Bowles, I believe, is president.

Q. And you had to allow him a loss from damage—reduced price?

A. Yes, sir.

Q. I will show you a statement and ask if that is a true statement taken from your books, showing your actual damage or loss on both iron and cement.

A. Yes, sir.

Mr. WOOD: I will state to the Court that the libel will be found to be I think about \$6,000.00. The libel was brought in order to seize the ship and before the damage was known and was estimated from the way the iron came out. We thought the entire cement cargo would be ruined, but when it came actually to repacking it and disposing of it, it has reduced the actual damage to the amount here stated, \$1,491.26.

COURT: On both the iron and cement?

Mr. WOOD: On both the iron and cement, that

is the total damage.

Statement offered in evidence and marked "Libellant's Exhibit A."

Mr. McCAMANT: I have agreed that the statement may stand in lieu of the book. I don't care to put the witness to the trouble of bringing his books up here.

Q. I will ask you if these are the bills of lading upon which the cement and steel were received by the ship.

A. Yes, sir.

Mr. WOOD: We make the offer, Mr. McCamant, to show they were received on board in good order and condition.

Mr. McCAMANT: I don't think we have any objections to that.

Bills of lading marked "Libellant's Exhibits B & C."

Q. Do you know where this cargo from the ship was stored—what part of the hold?

A. In a general way.

Q. Well, state what you know and how you know it.

A. There was cement stowed in between decks. I am not able to say of my own knowledge how many barrels. There was some plate steel—steel plates, as they are called; there was a lot of marble, Venetian red in barrels; a lot of talc in barrels or bags, and a lot of other general cargo, small stuff, and in the lower hold was a lot—some cement and all of the steel other than the plates; a lot of pig iron and coke. I omitted

to mention that there was some pig iron in between decks, but how much I cannot say of my own knowledge.

Q. Now, in proportion—in relation to this two-thirds and one-third rule of weight, how would you say that she was stowed in that regard?

Mr. McCAMANT: I object. This witness hasn't qualified to be able to speak as to that. He says he doesn't know of his own knowledge how many barrels of cement or how much pig iron or anything about it. How could he tell the court about the distribution by weight?

Mr. WOOD: I don't believe he can advise the Court precisely, but I think any man who has been in the business as long as he has can give a general estimate.

COURT: If he examined the vessel after her arrival here he might give his impression, I suppose.

Mr. WOOD: Simply for what it is worth, is all.

Mr. McCAMANT: Save an exception.

A. I might be, if I was certain just how much weight of the cargo had been stowed in between decks, but as we did not actually take steps to find out just what was stowed in between decks until the cargo from between decks had been discharged, we could only—I could only estimate the amount. I went carefully over it and figuring up the number of barrels of cement and taking the weight of the general cargo from the manifest—bills of lading and customs report—I arrived at the conclusion there was not to

exceed eight hundred to eight hundred and fifty tons in between decks. I took steps then to cable to the other side to find out from the stevedores who loaded the vessel how much weight they had put in, because I was of the firm opinion that there was not a sufficient quantity of cargo stowed in between decks. All the evidence tending to show that there was too great a weight in the lower hold and not enough in between decks.

Mr. McCAMANT: I move to strike out the last sentence of the witness' answer.

COURT: Yes.

A. I therefore cabled to our house in Liverpool to ascertain the weight of the pig iron in between decks. They replied—

Mr. McCAMANT: I object to the cable reply.

Mr. WOOD: Never mind, it is not competent for you to state the reply. Just give your own impression from your own investigation.

A. And from the reports that I received—

Mr. McCAMANT: I object to investigation based on reports received.

A. My own observation on the dock?

Q. Yes.

A. Arrived at the conclusion there was not to exceed eight hundred to eight hundred and fifty tons of cargo in between decks.

Q. And how much was the total cargo?

A. 2960—2980 tons.

Q. Nearly 3000 tons?

A. Just under 3000 tons.

Cross Examination.

(Questions by Mr. McCAMANT):

Q. Mr. Tucker, do you say you got the weights from the manifest of the ship?

A. Yes, partly.

Q. Don't you know that the manifest did not contain the weights of that cargo?

A. No.

Q. Are you sure, Mr. Tucker, that there are any weights on that manifest?

A. To the best of my knowledge and belief there are.

Q. When did you see the manifest?

A. I saw it this morning.

Q. You saw the manifest this morning? And you tell the court that the weight of the cargo was listed on it?

A. To the best of my knowledge and belief it is. I have never paid much attention to it and I say I got it from the manifest and bills of lading. To the best of my knowledge and belief it is on the manifest.

Q. When was it you began to make this estimate as to how much of the cargo was in between decks?

A. As soon as we found the cargo was coming out in such seriously damaged condition.

Q. And you didn't find that until between decks had been completely discharged, did you?

A. Oh, we found considerable damage before between decks were all discharged, and we had reason to believe, by examination of the cargo in the lower

hold that there would be materially more. We came to the conclusion, even before between decks were discharged, that there had been serious damage.

Q. Now, Mr. Tucker, did you weigh this cargo as it came out?

A. I, personally?

Q. Did any one in you employ weigh it as it came out?

A. No, the Customs House officials did weigh all her cargo. We never interfere with them.

Q. They would only weigh so much of the cargo as called for a tariff based on weights, wouldn't they?

A. No, they weigh the coke, which has the *ad valorem* duty.

Q. Well, isn't the *ad valorem* duty—isn't the duty on the coke so much per ton?

A. No, *ad valorem*.

Q. Do you mean to say that they weigh the whole cargo, then—the Customs House people did?

A. You mean every single bucket of cement and every piece of coke?

Q. Yes. Did they weigh each cargo?

A. If you mean that, no.

Q. They did not?

A. No, not that way.

Q. Do you know what they do weigh and what they do not?

A. They weighed a percentage, as they always do in the case of cement, a certain number of barrels. And in the case of the coke they weigh so many tubs

and count the balance, and average the weight as ascertained from those that they did weigh and from the number.

Q. Don't they have at the Customs House a general rule that a barrel of cement weighs 400 pounds?

A. No.

Q. They don't?

A. I never heard of it if they do. A barrel of cement is supposed to weigh 400 pounds, but it is the exception to have it weight that much, particularly continental cement. The average weight of continental cement, to my mind, is not to exceed 396 pounds.

Q. Was there any weighing of that cargo done except what was done by the Customs House people?

A. As far as I remember the pig iron was all weighed after the Customs House got through with it, for the purpose of delivering to customers, but I won't swear to that. That is my recollection of it, and further we may have weighed a good many barrels of cement, being very disappointed at the weight charged us for duty purposes by the Customs House, for as I remember it now the weight of that cement was given by the weighers at 403 pounds and a fraction per barrel, as against a usual weight of 396 or seven, and we came to the conclusion that the barrels being all wet with sea water and sweat from the vessel, were all badly damaged and had absorbed several pounds of moisture per barrel, average.

Q. Are you sure you weighed any of the cement?

A. Yes, I saw a number of barrels weighed my-

self; had men put them out—that is, maybe half a dozen; I couldn't say now, because I had no reason at that time to remember.

Q. Did you make a record of the weight of those barrels?

A. I think not.

Q. Did you make a record of the weight of the pig iron?

A. Surely.

Q. That you weighed?

A. Certainly.

Q. Where is that record?

A. In our books, where we charged—no, hold on—all this pig iron, as I recall now, was sold to the Northwest Steel Company and we charged them by the Customs House weights. Whatever they did after that I don't know.

Q. Then, if it was charged—if it was sold on Customs House weights it was not re-weighed under your direction, was it?

A. Not under our direction, no.

Q. You don't know whether it was re-weighed at all, do you?

A. No.

Q. And in any event you don't know there was any weighing of the portion in between decks as compared with the portion in the lower hold, do you?

A. No.

Q. If there was any weighing it was weighed after the entire cargo of pig iron had been put together,

wasn't it?

A. Well, the entire cargo of pig iron, as far as I recall, Mr. McCamant, was not all discharged at one dock, therefore it couldn't have been all placed together. I may be mistaken about that; that is only my recollection of the affair. I believe part of it was discharged at the Northwest Steel Company's dock, a part of it at the Lower Columbia, and a part at the Upper Columbia, or it may all have been discharged at the Columbia docks, Upper and Lower.

Q. But in any event, Mr. Tucker, it was not segregated on discharge?

A. No.

Q. With reference to the place where it had been stowed on the vessel, was it?

A. No, sir, it was not.

Q. And any weighing that took place here was not the weighing separately of so much as was in between decks, was it?

A. No, sir.

Q. And except as the Customs House people did the weighing you don't know of any weighing that was done except these few barrels of cement that you speak of?

A. Here, or on the other side?

Q. Here in Portland?

A. Here? Yes, that is all I know, but we weighed some of the general cargo that I think the Customs House did not weigh. We often do that, to ascertain whether the weights as given in the bills of lading are correct.

Q. You weighed some of the general cargo, you say?

A. I think in all probability we did with that vessel's cargo for the simple reason that it is customary for us to do so.

Q. Have you any recollection as to this particular cargo?

A. Not sufficiently to be able to say for a certainty; I merely say we may have done so.

Q. Will you examine this plan of stowage and state whether or not that agrees with your recollection as to the way in which that cargo was stowed?

A. Do you mean as to the general plan of stowage?

Q. Yes.

A. This is so many barrels of cement along here.

Q. I believe you said you could only testify in a general way, did you not, about the stowage?

A. Yes.

Q. Well, state in a general way whether this is a correct plan of the stowage of the vessel.

A. Yes, as far as between decks is concerned, without anything to say about the weights of these things in here. I don't know anything about that. The actual number of barrels there, of my own knowledge. Yes, as far as the general plan of stowage is concerned, I believe it is.

Mr. McCAMANT: We offer this in evidence.

Sketch marked Claimant's Exhibit I.

Mr. WOOD: Simply to illustrate his testimony I don't object to it.

Q. There was this general cargo—except the whiskey—was in between decks, was it, Mr. Tucker, the mineral water and the sundry packages and the seeds and the marble?

A. All of that, I believe.

Q. And the talcum?

A. Was in between decks. The whiskey was taken care of separately in a specially blocked off space.

Q. And that was in the lower hold?

A. No, I think you will find that that was in the after end of between decks, in the part reserved in storage, probably in the lazaret, something of that sort.

Q. There was pig iron and plate iron in between decks, was there not?

A. Well, changed into plate steel, yes.

Q. Yes, plate steel, and there was ochre?

A. Yes.

Q. And Venetian red in between decks, and all the coke was in the lower hold?

A. Yes.

(Witness excused.)

Mr. WOOD: Mr. Walter Beebe will be here this morning. He is only to testify as Mr. Bowles did, as an officer of the Northwest Steel Company, as to the condition of the steel, and if he comes in I would ask leave to put him on the stand. Under my theory of the law, we have here offered proof as to the condition in which the cargo was received, and that it was received aboard in good condition and I think the burden of proof now rests on the ship to excuse the bad condition, and any further testimony that I

offer will be in rebuttal of that, so I will close this stage of the case.

Mr. McCAMANT: May I ask Mr. Tucker, before that is done, one or two additional questions upon cross examination?

Mr. WOOD: Yes.

ALFRED TUCKER. Recalled for further cross examination.

(Questions by Mr. McCAMANT):

Q. Mr. Tucker, did you pay the Northwest Steel Company this sum of \$597.00 loss on Libellant's Exhibit "A"?

A. Yes, sir.

Q. You know that they got that money?

A. Yes, sir.

Q. How did it come that you charged storage on the cement? That storage would have been necessary to pay would it not, in any event, whether the cargo had been damaged, or otherwise?

A. No, sir, because I only made an average charge there, or rather, I charged for the additional storage over and above what we would have had to pay, had the cargo been in good order and condition, because all that was in good order and condition was sold a long time before we were able to repack and get rid of the damaged, and therefore it was only fair to include the storage charges on the actually damaged cement.

Q. As a matter of fact, you could have sold that damaged cement as soon as the re-conditioning process was finished, couldn't you?

A. We did. It was all practically sold before it was re-conditioned, subject to being re-conditioned.

Q. Did it take four months to re-condition the cement?

A. Yes. Not in actual work, but through our inability to obtain competent labor to do the work.

Q. Well, there must have been help that was available here in less time than four months, to do that work.

A. Ample help, but not competent to do that work satisfactorily;

Q. Are those the prices at which you actually sold the cement?

A. Yes.

(Witness excused.)

WALTER BROWN BEEBE. A witness called by the libellant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WOOD):

Q. Mr. Beebe, you are connected with the Northwest Steel Company, are you not?

A. Yes, sir.

Q. And were you so connected in September, 1909?

A. Yes, sir.

Q. And your company took the steel—in fact, it was imported for your account—that came in on the Babin Chevaye?

A. Yes, sir.

Q. State what was the condition of that steel, as to rust.

A. It was very badly rusted by salt water, which produced a heavy scale, under which—the effect of the salt water—the steel continued to act.

Q. You remember what was allowed you in the settlement?

A. I have hastily taken off these figures from the books, if you want them.

Mr. WOOD: Yes. No objection?

Mr. McCAMANT: No.

Q. Yes, just state them.

A. We had on account of rust a claim of \$1116.00, the details of which are 32000 pounds 3-8" bars that were practically destroyed; in other words, we figured 80 per cent; and 20,000 pounds of the same size we figured 50 per cent. For 5,000 pounds of the same size we figured a 20 per cent damage. There were 4,000 pounds 1-2" bars we figured damage to the extent of 20 per cent, and 5,000 5-8" to 1" bars which we figured damage to the extent of 10 per cent. The reason for subdividing the sizes is because each size—those three sizes carry different prices. And we afterwards compromised that claim on the basis of allowing them a credit of \$597.00 in order to get the matter settled. It is so long ago I have forgotten just how we arrived at that compromise.

Cross Examination.

(Questions by Mr. McCAMANT):

Q. What did you do with this material, Mr. Bee-

be? What did you do with this merchandise?

A. We imported for re-enforced concrete purposes.

Q. Did you use it for this purpose?

A. We used some of it; after we cleaned it all up, to another—sold it at job lot.

Q. Sold to another. What did you get for it when you sold it to another firm?

A. I don't remember. I can tell you by reference to the books. If I recollect correctly, we sold for less than we paid for it, to clean it out.

(Witness excused.)

Libellant Rests.

Mr. McCAMANT: I offer in evidence, your Honor, the deposition of Emil Garnuchot, taken under stipulation.

Mr. WOOD: No objection.

Whereupon deposition was read.

Mr. WOOD: I wish to object to, and move to strike out the introduction of the rules of the Bureau Veritas and reference to them, and also the testimony of the witness as to what the French law requires, etc., as being incompetent and immaterial. What is material here is what was done actually in the way of inspection and I don't think he is competent to prove those laws, nor do I think material to be proven. They might require a certain thing to be done. Our question is, was it done?

COURT: That will be admitted subject to the objection as it stands in the record.

Mr. McCAMANT: I now will read the depo-

sition of Eugene Meeuwissen, the tally clerk.

During the reading of this deposition, Mr. McCamant explains as follows: Speaking of the stowage plan of this deposition (answers to interrogatory 9 etseq), "I think this is identical in all respects to the one I offered this morning except that the latter has the red ink translation on it. I may say to your Honor that I took the trouble myself to go over carefully these weights and they figured—assuming that the barrels of cement go 400 pounds and assuming that a thousand kilos make a ton—it figures exactly 954 tons in between decks."

COURT: Does this refer to English tons?
ton.

Mr. WOOD: Must be, or it would say kilos.

Mr. McCAMANT: 1,000 kilos, I am informed, make a ton. My figures in figuring it over differ six pounds. He says 960,590 kilos.

COURT: Hoy many tons do you say?

Mr. McCAMANT: 1,000 kilos to the ton.

Mr. McCAMANT: I now offer the deposition of Captain R. R. Baines.

Deposition read.

Mr. WOOD: You offer these depositions in evidence, and I presume it would be included, and if not I want to offer them, my notice to you to produce the statement of when she was last recaulked—it is attached to this deposition.

Mr. McCAMANT: I will now offer the deposition of Hyppolite Bureau.

Deposition read.

Mr. McCAMANT: I call your Honor's attention to this: When the master of the vessel came to consult me, he told me that the claimant was a French corporation. I accordingly pleaded that it was a French corporation, and Mr. Woods has stipulated that it is a French corporation. It appears from the testimony of this witness that, as a matter of fact, the ship was owned by a partnership.

Mr. WOOD: That can be corrected if necessary.

Mr. McCAMANT: I think it may as well go as a corporation, because the pleadings and stipulations are in, and that binds everybody.

After the reading of the deposition, Mr. Woods objected as follows.

Mr. WOOD: I want to object. He apparently is a mere mercantile owner, or partner. He says he has never been to sea, is not a seafaring man, and is not a managing owner. I don't think he is qualified to state whether the vessel was seaworthy, or was adequately supplied and moreover, where he says that she was put in good condition—the decks in good condition—it manifestly is all hearsay, as far as he is concerned.

Mr. McCAMANT: It doesn't appear to be hearsay. The ship was at Antwerp. He may have observed it himself. The fact that he supplied whatever his captain asked for is some evidence that the vessel was properly supplied, although we will be able to follow that up with other and better evidence.

COURT: It will be allowed to remain in the record, subject to the objection.

Whereupon proceedings herein were adjourned until 2 P. M. Friday, April 5, 1912.

Friday, April 5, 2 P. M.

Mr. McCAMANT: I now offer in evidence the depositions of Captain George E. Pryde, and Herman Langkopf.

Both depositions read in evidence.

CAPTAIN JOSEPH LEBEAUPIN. A witness called on behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination.

Mr. McCAMANT: I may say the Captain is not proficient in English and prefers to testify through an interpreter, and Mr. Wood has agreed that Mr. Matthes may serve as interpreter.

Mr. J. W. Matthes is thereupon sworn to truly interpret.

(Questions by Mr. McCAMANT):

Q. Captain, what experience have you had as a seafaring man?

A. I went to sea when I was 12 years old and I have been 8 years officer on sailing vessels exclusively.

Q. What office, if any, did you hold on the Babin Chevaye in the voyage which began on the 16th of February, 1909?

A. Captain.

Q. Prior to this voyage, how extensive had been your experience; how constantly had you been at sea, and for how long a time?

A. I have navigated 14 years and 8 years, the last 8 years of that time, I was officer.

Q. In what parts of the world have you navigated?

A. I have made principally the deep sea voyages around Cape Horn and one or two voyages to the island of Martinique, on the coast of South America.

Q. Did you command the Babin Chevaye on her return voyage from Portland to Europe, beginning in the Autumn of 1909?

A. Yes.

Q. Did you command her subsequently on any voyages, and if so, on what voyage?

A. Yes, I made one more voyage.

Q. You mean a round trip voyage?

A. Yes, round trip.

Q. I will ask you to examine the plan which I hand you and state what that is?

A. It is a plan of sailing vessel of about 3,000 tons of the same type as the Babin Chevaye and built at the same yards.

Q. Is the Babin Chevaye built on this same plan?

A. I only go by what her owners told me, as to the building. As to that matter I have the same plan, or the same map on board—I had it on board, signed by the ship builders.

Q. State whether or not to the best of your recollection that map correctly represents the construction of the Babin Chevaye.

A. Exactly the same, and I believe that even the

dimensions are the same.

Mr. McCAMANT: I offer in evidence the map identified by the witness. This has been already in evidence, I think, Mr. Wood, but under the witness' deposition.

Mr. WOOD: I have no objection as illustrating his testimony, but I don't think it has been proven competent as to the build of the Babin Chevaye. As a drawing to refer to and elucidate his testimony I have no objection.

Marked Claimant's Exhibit 2.

Mr. McCAMANT: I guess I am mistaken in saying it was offered in evidence, Mr. Wood; I don't see any copy of it.

Mr. WOOD: I don't remember any large blue print such as that.

Mr. McCAMANT: While I am introducing, you admit that is the charter party, do you not?

Mr. WOOD: I think it is, yes.

Mr. McCAMANT: I now offer in evidence a paper which is admitted to be the charter party of the Babin Chevaye for the voyage in question.

Marked Claimant's Exhibit 3.

Q. Captain, what was the condition of the Babin Chevaye when she left Antwerp on this voyage?

A. She was staunch, strong and—

Q. Seaworthy?

A. Seaworthy, yes, and good condition of navigability and fit in every respect to make the intended voyage.

Q. What was done with reference to overhaul-

ing and repairing the vessel at that time, if you know?

A. She had been examined by one of the surveyors of the Bureau Veritas and two deep sea captains and myself as to her condition, and then the vessel was put in drydock and in drydock all the rivets had been gone over to see if they needed any repair. Only just a few aft which had to be replaced or repaired, and after the vessel had been thoroughly cleaned she was painted with two coats of paint entirely on the outside and the ratlin was entirely gone over, if anything was—the ratlin was working all right; deck has been examined and all the chains and anchors have been examined to see if they were in good condition; and then of course in general all of the rivets all over the ship were examined and looked after, or looked over.

Q. What was the condition of the stanchions?

A. They were all in good condition, with the exception, I believe of one stanchion, which required some new rivets.

Q. Were those rivets put in?

A. Yes, the surveyor of the Bureau Veritas made them put it in.

Q. What was the condition of the stanchions and rivets on the vessel when she sailed?

A. In very good condition.

Q. What sort of an examination did you personally make prior to the time when the vessel left?

A. I went all over the ship when she was in drydock and went down in the hold and all over the deck, examined the deck, examined the seams with

my knife to see if they were properly fixed, and went up in the rigging to see if that was in good shape. I found that part of one of the masts was not quite in good condition, so I had the mast lowered to examine and verify exactly what needed repairs. I assisted in examining the donkey engine with two engineers appointed by the French Consul, who ordered some repairs to be made to that.

Q. Were the repairs made to the donkey engine?

A. Yes, of course, otherwise they wouldn't have given me my certificate.

Q. Were the repairs made to the mast as desired?

A. Yes, everything was found in good condition and had been repaired as ordered by the different surveyors appointed.

Q. What was the condition of the main deck of the vessel when she sailed?

A. In very good condition and perfectly watertight.

Q. What was the condition of the poop deck when the vessel sailed?

A. The same, also; in very good condition.

Q. What was the condition of the hatches and their coverings when the vessel left Antwerp?

A. They were in very good condition; there were three tarpaulins on each hatch and during the bad weather I had a breakwater built over the main hatch, to protect the tarpaulins.

Q. Were these tarpaulins watertight?

A. Yes, of course.

Q. Were any of them new?

A. The two lower ones were absolutely new, and the third one on top, to protect the others, had already made one voyage.

Q. What was the condition of this third tarpaulin?

A. It was in good condition, too; it was watertight, just the same.

Q. When was the Babin Chevaye built?

A. 1901, the same as that.

Q. What is the life of a sailing vessel as a first class sailing vessel; how long is she ordinarily rated as a first class vessel?

A. From fifteen to twenty years.

Q. Is she ordinarily used after the expiration of fifteen or twenty years as a sailing vessel of any other class?

A. Yes, she can go down into second or third class; all depends on the condition she is in and whether the repairs prescribed by the Bureau Veritas have been executed.

Q. How was this vessel manned when she left Antwerp in February, 1909?

A. Twenty-five men, all told, among whom three officers, two boatswains, one mechanic—

Q. Carpenter?

A. Well, the man who runs the donkey engine, engineer, sort of engineer-carpenter, and the balance are sailors, and one novice, or one layman, you might say.

Q. Apprentice?

A. One apprentice, yes.

Q. State whether or not these men were competent to perform their several duties.

A. Yes, they were all good sailors and capable of doing their duty.

Q. Was the first mate a competent navigator?

A. Yes, he had a license of deep sea captain, and I believe he had navigated for fifteen years.

Q. What can you say as to the second mate?

A. He was authorized—had a license to navigate sailing vessels on the French coast; a certain distance from shore, according to the prescriptions of the law he was in command.

Q. Was he qualified and capable of performing the work which fell to him on the voyage in question?

A. Yes, of course.

Q. Did the ship carry—well, he has stated she carried a carpenter. What can you say as to the qualifications of the carpenter?

A. For years he had worked in different ship-building yards where he was principally employed as caulker and for the last years he has taken to navigation.

Q. Did he know his business?

A. Yes, very well.

Q. State whether or not this complement of officers and crew was adequate to the proper navigation of the vessel.

A. I had one man more than is generally required; twenty-four is the usual requirement.

Q. Would twenty-four have been sufficient?

A. Yes, that would have been sufficient.

Q. How was the Babin Chevaye equipped for this voyage?

A. Had on board the chain, anchors, life boats, sails and all the necessary material required to make repairs, substitutes for the pumps and supplies to last one year.

Q. What was the condition of the pumps?

A. They were in very good condition and of the latest model.

Q. State whether or not she carried fuel for the use of the donkey engine and for other purposes.

A. I had thirty tons of coal.

Q. State whether or not that was sufficient.

A. Yes, amply.

Q. State whether or not the vessel was supplied with whatever was needful to her navigation and the proper care of her crew.

A. Yes, I gave the orders myself in Antwerp to put enough material to replace and provisions on board to last me one year.

Q. Do you know how the cargo was stowed on this voyage?

A. Yes.

Q. Will you examine this book and state what that is?

A. It is a record of the tally clerk employed and paid by me in Antwerp, containing all the cargo taken on board there from day to day.

Q. Please state whether the portions of the cargo

that are marked "Entrepont" were actually in between decks on that vessel?

A. Everything that is marked "Entrepont" was put in between decks.

Q. I call your attention to the last item noted in this little book, 940 barrels of cement, and I will ask you where that portion of the cargo was stowed?

A. No doubt, or undoubtedly, it was put in between decks, because it was the last item that was loaded, and it was impossible to put anything further in the hold, as it was absolutely filled.

Q. I call your attention to an item found on the second page of the book, entitled Cleveland and Silicates and Ormsby, and I will ask you to state how much of that iron, pig iron, was stowed in between decks, if you know?

A. You want to know where that was?

Q. Yes, I want to know how much of those items was in between decks.

A. According to the note behind—in the column behind—the weight, it says, two and three entreport, which I interpret and I remember very well at the time, were about 250 tons between decks and 50 tons in the hold.

Q. Is that pig iron?

A. Yes, that is pig iron.

Q. I will ask you to examine Claimant's Exhibit 1 and state whether that is an accurate plan of the stowage of the vessel.

A. It is a load plan made by the tally clerk at Antwerp and handed to me before the sailing of the ves-

sel—handed to the first mate.

Q. State whether or not it is an accurate plan of the stowage of the vessel.

A. As far as the merchandise goes it is correct, but I don't quite remember the exact quantities.

Q. Do you remember how much of the pig iron was in between deck.

A. About 250—

Mr. WOOD: I object to the witness answering from that document, which is papers simply handed to him by another person. He is reading or refreshing his memory from it, which I don't think is competent.

COURT: If he knows, of his own knowledge. The tally clerk testified to this.

Mr. McCAMANT: To this last question I think perhaps that objection is well taken. What I am trying to do is to re-enforce and corroborate the testimony of the tally clerk, and I think the Captain is able, in a general way, to do that.

Q. Captain, where was the whiskey loaded on this vessel with reference to whether it was nearer the lower hold or nearer between decks? I suppose perhaps counsel will object to your testifying from the record aside from your recollection.

Mr. WOOD: I thought he was going to point out the place.

Mr. McCAMANT: It appears perfectly plain here.

A. It was stowed in a special place in the lazarette, which is closer to the deck than it would be to the

hold.

Q. How did it vary from the level of the between decks—from the bottom of the between decks—how did the place where the whiskey was stowed compare with the level of the bottom of the between decks?

A. Half ways between the bottom of the ship and between decks—the bottom of the between decks.

Q. Approximately how much of the cargo by weight was in between decks, and how much in the lower hold?

A. At my first calculation in Antwerp, I found 960 tons in between decks, and 2020 in the lower hold—French tons.

Q. Did you ever have any occasion to revise these figures?

A. No, it always remained the same.

Q. State whether or not the book which I have handed you is an accurate statement of the cargo carried by the vessel?

A. That book contains the entire cargo, and was the weights, according to the loads and receipts at the time of taking them on board.

Mr. McCAMANT: I offer in evidence, the book identified by the witness.

Mr. WOOD: I object, and would like to ask a question or two about it. Did you make this book out yourself?

A. No.

Mr. WOOD: Where did you get it from?

A. The tally clerk.

Mr. WOOD: At what time?

A. When the vessel sailed from Antwerp.

Mr. WOOD: When did he make it out?

A. From day to day as the loading had proceeded.

Mr. WOOD: When you say it is a correct statement of the cargo, you mean that you suppose the tally clerk got it correctly, do you?

A. I said that the weights were correct, according to the loading receipts.

Mr. WOOD: How do you know?

A. Because every loading receipt giving the weight, the weight was put on that book as the item.

Mr. WOOD: Do you remember what cargo was in between decks?

A. More or less, practically sure.

Mr. WOOD: Independent of this book you remember it?

A. Yes, I know the entire cargo that was in between decks, but I don't remember the exact weights.

Mr. WOOD: Except as given in this book?

A. I don't know it by memory. If I would look at the book, I would know.

Mr. WOOD: Without going further, I object to this book if offered even with the tally clerk on the witness stand, because I hold it would be a memorandum from which he could refresh his memory, but not put the book in to speak for itself as a witness. And I object to it with the captain, because it is not even his own memorandum. He is evidently relying on it for the statements he is making.

COURT: Let it be admitted subject to that objection. It was identified by the tally clerk.

Mr. McCAMANT: No, it is another book, but the two books were both made out by that man at the same time.

Book marked "Claimant's Exhibit 4."

Mr. WOOD: I didn't know another book. Is there another attached to his deposition?

Mr. McCAMANT: Yes.

Mr. WOOD: We make the same objection to that. He can refresh his memory from it, but cannot put it in to speak for itself as a witness.

Q. Would it be possible for any very great mistake in the weight of this cargo to escape you, Captain?

Mr. WOOD: Objected to as incompetent. That would be a mere opinion.

COURT: Let him answer.

A. No, I don't think so.

Q. State your opinion with reference to the distribution of this cargo between the between decks and the lower hold.

A. You mean in general?

Q. No, on this particular vessel—on this particular voyage.

A. According to my experience, I considered the cargo well loaded, and that about one-third was in between decks, and two-thirds in the hold, and that the weights were properly distributed so not all the heavy cargo was in one point. The iron had been protected by wooden boards, and to separate the coke from the

other merchandise, I had built two solid bulkheads, and where the seed was loaded, I had put sacks for protection; and to assist me I had taken Captain Baines, a surveyor. My first mate was all the time in the hold.

Q. If it had been found when the vessel got to sea, that the stowage was improper, as to the distribution of the cargo between the between decks and the lower hold, would it have been possible for you to have moved any portion of the cargo, or stores, so as to have relieved against any error in that regard?

A. I couldn't have done anything with the cargo, but I could have done something with the provisions and the coal. I had 20 tons of water, 30 tons of coal at the botom of the hold, and about 15 tons of provisions, which could have been put in between decks if it had proven that the ship wasn't properly loaded.

Q. Where were those 15 tons of stores, as it was?

A. The 30 tons of coal were in the hold forward, and the 20 were in the center, and the provisions were in the same place as the whiskey was. It would have been a difficult job to have removed the water if it had proven necessary, because I had a distiller to get rid of it, to get it out.

Q. As a matter of fact, how did the ship navigate when she got to sea?

A. She behaved very well, and I never discovered anything abnormal.

Q. If there had been an improper distribution of cargo as between the lower hold and between decks, would you have found it out in the way in which the

vessel navigated?

A. Yes, by various causes. First, by the rolling, and second, by the way—or of course the ship would take contrary to the course given by the rudder, because when a vessel is properly loaded, it is easy to keep her in her course.

Q. Was there in fact any indication from the way the vessel navigated that her cargo was improperly distributed?

A. None whatever.

Q. In case a mistake is made in the distribution of the cargo, which mistake is the more serious—to put too much or too little in between decks?

A. According to my experience, I prefer to have more in the hold than in between decks; particularly, also, because the provisions are more or less in the hold, and as they are being used up, the weight in the hold gets lighter, and the effects of the sea on the ship are less serious than if she is loaded heavier in the hold than if she had more cargo in between decks.

Q. How were the seams on the poop deck calked when the vessel left Antwerp?

A. You mean what condition the seams were in?

Q. No, what material were they calked with?

A. They were calked with oakum and putty.

Q. State what is the proper material for the caulking of the seams of the poop deck.

A. It is generally left to the captain, and, in my opinion, I prefer to have putty.

Q. What effect did the heat in the neighborhood of the Equator have on the caulking on the poop deck?

A. When we passed the Equator, the wood dries out, and the putty gets dry and sometimes some small leaks are caused, which are repaired; and, if we had pitch on there, the heat would melt this, and there would be nothing left at all. It would be all running over the decks.

Q. What happened on this particular voyage, with reference to the seams of the poop deck, when the vessel got in the neighborhood of the Equator?

A. I discovered a few leaks which I had repaired after the rains were over.

Q. What was the condition of the vessel after this—what was the condition of the poop deck after these repairs had been made?

A. Water tight.

Q. What had been the condition of the weather prior to the time when these repairs were made?

A. I had had normal weather and very warm near the Equator.

Q. Had you had any storms prior to that time?

A. No.

Q. Had there been any indication that the vessel was leaking up to that time?

A. No, none whatever.

Q. Under whose direction were the log books of the vessel kept on this voyage?

A. By my two mates—the first and second mate, and it was O. K'd every night by me.

Q. Did you always read over the record in the evening before approving it?

A. Yes, certainly.

Q. And did you read it over every night?

A. Yes.

Q. Are these the log books of the Babin Chevaye on that voyage?

A. Yes.

Q. Refresh your memory, if necessary, by the records contained in the log books, and state what the condition of the sea was on the 18th of April, 1909.

Mr. WOOD: We object to the use of the log books to refresh his memory, as I believe it is established that the log book itself, in the first place, cannot be introduced on behalf of the ship, as it is a self-serving declaration, although it may be used against her, and it cannot be used as a memorandum as now attempted, to refresh the memory, unless it was made by the witness who is on the stand. In other words, these log books were made by his officers, and I do not understand he can take their entries, and practically read them into the record.

COURT: I understood him to say he verified them every night, and knows them to be correct.

Mr. McCAMANT: And the *Journale de mer* is here signed in fact by this witness on each record.

COURT: I think he can use it.

Mr. McCAMANT: I think he should use this to refresh his memory. No man could carry in mind, after a lapse of two and a half years, the weather and sea conditions on a particular day.

COURT: Well, he can testify.

Q. The condition of the sea on the 18th of April, 1909.

A. Bad weather, running sea, violent lowering. The deck is constantly covered with water, and try to change the course of the vessel by changing the sails so as not to roll so much.

Q. What was the latitude at that time?

A. 43 degrees south.

Q. What was the condition of the sea on the 29th of April, 1909?

A. Strong wind from the east, southeast. The waves continuous, would ship on the vessel. The vessel continuously ships waves. The deck is constantly full.

Q. What were the conditions on the first of May?

A. Very bad weather. The vessel experiences severe strain on account of the condition of the sea. Violent rolling, causing fears for the safety of the cargo. The deck is constantly swept by seas. Vessel strains very much, both in masts, rigging and sails. The barometer sinks two degrees, which is very rare; two degrees an hour, which is considered very rare.

Q. What was the condition on the 2nd of May?

A. Sudden change of wind, violent rolling, and the deck is continuously covered with water.

Q. What indication did the pumps give, if anything on this day, as to whether the vessel had, up to this time, leaked any?

A. So far pumps are always clear, according to the books.

Q. What did that indicate as to whether the vessel had leaked any up to this time?

A. No, it indicated there were no leaks.

Q. What were the conditions on the fourth of May?

A. 10 P. M., a storm is blowing; the vessel behaves very well, in spite of the fact that the deck is constantly covered with water.

Q. What was the condition of the wind on that day?

A. The weather was very strong, quoted here as nine, the maximum being twelve.

Q. That is the wind?

A. The wind was very strong, and is quoted here as nine, showing the degree of strength of the wind, the maximum wind being generally twelve.

Q. What were the conditions on the 5th of May?

A. The storm continues, and I am obliged to take sails in. The deck is constantly full, from starboard to port side. At 5 P. M., the storm increases in violence, sea is very high, and the seas cover the deck from one end to the other, and, in order to avoid accidents, I am obliged to let the ship sail with the waves.

Q. What were the conditions on the 6th of May?

A. Two days before it had been storming right along, and I was sailing under—

Q. 6th of May I am now asking about.

Interrupted: Well, I don't remember now the exact sails.

Mr. WOOD: You don't remember the English word for the sail?

COURT: What do you mean?

Interrupted: Well, he said exactly what sails he had up.

COURT: Can you tell?

Interrupted: I believe I can tell it from my errors or protest book, because I translated it from there. Is it in there?

Mr. McCAMANT: I don't think the sails are there.

Interrupted: Unless I get the sails exactly correct, it might be wrong.

Mr. McCAMANT: I don't care particularly about the number of sails out.

A. The sea was literally mountain high. Decks were absolutely covered with water, and I couldn't tell whether the vessel was taking on water from one side or the other, because the water was running all over.

Q. At seven in the morning what happened?

A. The wind is blowing a gale; the break water on the main hatch is carried away by the sea.

Q. Was that the break water which you constructed yourself on taking command of the vessel?

A. Yes.

Q. Did this—did the washing away of this break water, let water into the main hatch?

A. No, because the tarpaulins remained—they were still there.

Q. What effect did this sea have on the vessel?

A. Considering the condition of the weather, the vessel behaved very well, and answered the helm.

Q. How were the pumps?

A. The pumps were clear.

Q. Proceed and tell what happened on that day and what the condition of the sea and weather was from time to time.

A. I never saw such a strong wind, and high seas as on that day. At noon there was a let-up of the bad weather which made us hope that the storm would abate, but about 3:20 P. M., the vessel was caught by two tremendous waves. The first one didn't hit the vessel, but lifted the bow so far out of the water that the stern went out—went way down into the water, and the second wave at that same moment, landed on the poop deck, broke in the steering box cover, broke a few spokes in the wheel, smashed the door of the chart room, and also the wall in between the staircase and the chart room, carried away everything there was in the chart room, maps and everything movable, and I had just entered the chart room five minutes before, and so I was swimming around in the chart room. The water descended the staircase, and covered all the quarters and the saloon with a foot of water. The two men that were at the wheel were carried away, Gallen and Jaocum. Gallen was found a little ways off—Gallen was found a little ways further on the deck with his arm broken. The second mate was swept over the entire poop deck, and recovered at the bottom of the staircase with a broken

leg. The carpenter, Quelen, was also carried away, and was found near the rail with already two legs overboard, and just—and he was assisted just in time by another sailor, who was Riou—who was standing near the chart room. He had his jaw smashed. Fortunately the first mate, the first boatswain, who stood near the wheel, grabbed the steering wheel, because otherwise all of us and the ship would have been lost. And as soon as I could get out of the chart room, I had the other men of the watch called so as to assist him, and I discovered that two men were missing, and after consulting with the entire crew, it was decided that it was impossible to save the two men, and as soon as I was able, I—a few hours afterwards, as soon as I was able, I had the water removed from the quarters and the saloon, but there was so much water in the sail room that it had already leaked down to the between decks.

Q. Will you point out on Claimant's Exhibit 2 how the water went down from the chart room into the sail room, and from the sail room into the cargo?

A. The water came over here, over the poop deck, stove in the door of the chart room and the wall, went down the staircase, and there was one foot here; in the aft quarters was one foot of water. The water went down the little hatch in the sail room, and got into the between decks, and it has dispersed itself over the entire between decks, over the steel, because in between decks, there is a large plate of iron to reinforce the vessel, and the water has followed this plate

further than half the vessel—the middle of the vessel.

Q. The plate of iron you speak of is in the vessel for what purpose?

A. To reinforce, to strengthen the vessel.

Q. State what the hatch leading down into the sail room and the store room is used for?

A. Nearly every moment we have to go down their—either for provisions or for sails, or for material to make repairs, and at the time that this water came down the hatch—came down the staircase—one man had just opened this little hatch and was down there to get something to repair the sails that had been torn.

Q. Is it possible, in the practical navigation of such a vessel as the Babin Chevaye, to keep that particular hatch battened down?

A. No, we couldn't do that, because we have to pass through it too often, and it is very seldom that any water would go down there except in case of an accident.

Q. What was the construction of the wall and door of the chart room prior to the time when this storm was encountered?

A. The door and wall were in good condition, and in the eight or nine years that the vessel had been at sea, there had never been any damage done to it.

Q. What was the condition of the wheel house prior to the time that this storm was encountered?

A. Very good condition also, and additionally secured with ropes, tied down.

Q. What did you do with reference to repairing the damage to the wall and door of the chart room?

A. I made a strong door which would slide back and forth, and the inside wall I have not repaired because—I repaired that temporarily with sails to be able to show the damage done, to the receivers of the cargo.

Q. I didn't understand. What does he mean by that?

A. It was on the inside, and consequently was not absolutely necessary to repair that, and I only repaired it temporarily.

Q. How soon did you make the temporary repairs that you speak of?

A. Next day.

Q. When you got the sails door constructed, what was the condition of the wall of the chart room as to whether it was water tight, and would keep out the sea?

A. You mean the wall and the door?

Q. The wall and the door. I think you said the wall was damaged.

A. On the inside.

Q. What was the condition of the door of the chart room?

A. It is very seldom that water is shipped on the poop deck, but as it was, it was properly repaired, but probably not absolutely water tight. Couldn't be absolutely tight, because the door had to be removed once in awhile, whenever anybody had to pass.

Q. Was it possible for you, under the conditions,

to make any better repairs than you did?

A. No, not while at sea.

Q. Now, what were the conditions on the 7th of May?

A. The weather improves a little, but the seas are still so high, that it is impossible to gain any headway. The vessel is rolling to such an extent, that fear is entertained for the safety of the sails.

Q. Was an inspection made of the masts and rigging on that day?

A. The 7th of May, you say?

Q. Yes.

A. Yes, we replaced the broken stays, and made an examination in the masts.

Q. What were the conditions on the 8th of May?

A. Gales, considerable rolling. The weather—the vessel strains very much, as well as the rigging and the masts. Obligated to sail with the wind behind, on account of the condition of the sea and of the wind. The deck is absolutely full. During the entire day, we had to sail with the wind from behind for the safety of the vessel.

Q. What did the pumps show on this day?

A. The pumps show an increase of five centimeters water in the hold.

Q. Five centimeters is how many inches?

Interpreter: About one and a half, I think.

A. It is impossible when the vessel is rolling as she did at that time to get at the exact quantity of height of the water in the hold, because the entire pump is naturally soaked at the bottom with water,

and it is impossible to get at the right height in one place.

Q. What were the conditions on the 9th of May?

A. The same kind of weather, the vessel strains heavily, rolling, and a few seas are shipped.

Q. What were the conditions on the 10th of May?

A. The weather is improving considerably, the wind has let up, but the vessel still suffers from severe rolling on account of the mountain-high seas, which strain the vessel. On that day, we visited the hold, and found five barrels of cement loose.

Q. What was done with reference to these barrels of cement?

A. We have re-stowed them, and the entire after end of cement discovered to be wet.

Q. What were the conditions on the 12th of May?

A. Weather awful. Very heavy sea, taking the ship from the side, and straining enormously the masts and the rigging. Violent shocks felt through the heavy rolling, shocking the ship from the stem to stern. The deck is completely full.

Q. When you say the deck was completely full, what do you mean?

A. I mean by that that the deck was entirely covered up to the bulwarks, and that water runs over the hatches, and that the deck—that the vessel ships water from the lee side as well as from the off side—what do you call that?

Mr. McCAMANT: The wind side.

A. The wind side. At 11 A. M., it is impossible to continue our course. We steer with the wind.

Q. What was the condition at 1 P. M. on that day?

A. Weather awful. I just mentioned that.

Q. What was the condition at 9 P. M. on that day?

A. A jump of the wind from west to northwest, and on account of the change of the wind, the vessel shipped some water.

Q. What happened to the railing of the poop ladder?

A. The poop ladder was carried away as well as the covers of the life boats. The third tarpaulin of the main hatch was carried away, and also the tarpaulin of the man hole of the pump was torn and carried away.

Q. How about the other two tarpaulin on the main hatch?

A. Those remained intact.

Q. Did they remain water tight?

A. Yes, certainly.

Q. What happened to the port side of the deck house?

A. The deck, you say, the deck house?

Q. The port side of the deck house, the 12th of May.

A. Oh, the port side of the dcek house was entire-ly dented in. -----

Q. What was the construction of this side of the deck house prior to the storm?

A. She was in good condition, and one centimeter—no, one-half centimeter, I think—one-half centimet-

er thick of steel and reinforced with additional iron.

Q. What was the condition of the railing of the poop ladder prior to the time this storm was encountered?

A. Very good shape, built of good wood.

Mr. McCAMANT: If counsel and Court will allow me to have the captain step aside, and call Mr. Barnes—I do not like to detain him.

(Witness temporarily excused.)

RALPH F. BARNES, a witness called on behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. McCAMANT:

Mr. Barnes, what is your occupation?

A. A Deputy Collector of Customs.

Q. How long have you been in the Customs House?

A. 14 years.

Q. Have you with you the manifests of the Babin Chevaye, filed in the Customs House on her voyage which terminated in August or September, 1909?

A. Yes, sir.

Q. Will you produce it?

A. I will

Mr. McCAMANT: I offer in evidence, your Honor, the manifests, and ask leave to substitute copies for the original.

Q. Could you furnish us with a copy of that blank, Mr. Barnes, or have you no blanks of that class in your office?

A. I will certify a copy if you prepare it. You may have permission to make copy. We do not make copy.

Mr. WOOD: We object to that as immaterial and incompetent.

Mr. McCAMANT: We offer this to show the insufficiency of this as a foundation for the testimony which Mr. Tucker gave with reference to the weight and distribution of the cargo.

COURT: Offer it for whatever it is worth. That is the ship's manifest?

Mr. McCAMANT: Yes.

Mr. WOOD: No, the Customs House manifest, for importing purposes only. Here is the ship's manifest here.

Mr. McCAMANT: Is that the one Mr. Tucker referred to?

Mr. WOOD: Yes. That is the Customs House manifest.

Mr. McCAMANT: Well, I ask leave to introduce this copy.

Q. Now, Mr. Barnes, will you state what articles on that manifest would be weighed by the Customs House for the purpose of determining duty?

Mr. WOOD: We object to that as incompetent. He should state which were weighed, not which ought to have been weighed.

Q. Well, which were weighed, if you know?

A. Do you mean to go through the entire manifest?

Q. Yes, there are only a comparatively few items

there—fifteen or twenty. Which ones were weighed?

A. I do not know that I can tell off-hand to an absolute certainty, all the articles that were weighed. You realize there is a change in tariff, you know. This came in after the change in tariff went into effect. All or a part of the cement was weighed. The angle bars, channels and beams, the pig iron and coke, the mustard; all the iron was weighed.

Q. Anything else?

A. Not having a copy of the tariff with me, I do not recall the rates of these items here, Mr. McCamant, and I couldn't swear that is all. I think curry powder is double off, and I think ocher is, although it may be 30 per cent. If I had thought, I would have brought a tariff book along, and would have been able to tell you, but that is the heavy part of the cargo.

Q. All of that you think was weighed?

A. I am certain of it. I do not wish you to understand all of the cement was weighed. We weigh only ten per cent of the cement.

Cross Examination.

Questions by Mr. WOOD:

Did you weigh it, Mr. Barnes?

A. No, sir.

Q. Were you present when weighed?

A. No, sir, I ordered it weighed.

Q. You don't know whether it was weighed or not, but you assume that your instructions were carried out?

A. I have in the office the report of the man who

did weigh it.

Mr. WOOD: I object to this as entirely incompetent.

COURT: Let it stand for whatever it is worth.

Q. Will you leave it until the end of the trial?

A. Not unless the Judge orders it. Our rules are that office documents shall not be left outside.

Mr. McCamant: I suppose the only remedy, your Honor, would be to read it into the record, and I do not like to take the time to do that.

COURT: You haven't a copy of it?

Mr. McCAMANT: No, your Honor.

Mr. WOOD: He can make a copy of it if the Court admits it, and you can get it.

Mr. McCAMANT (To witness): You say your regulations forbid you to make a copy?

A. Do not forbid it, but do not require it, and we don't make copies of documents of that sort. We certify copies that may be made in the office.

Mr. McCAMANT: I am trying to find an easy way, Mr. Barnes, to comply with your regulations. Is there some one down there who would be willing, for compensation, to make a copy which can be substituted for this original?

A. Send any one down. They can make the copy, and I will certify it is a copy. I suppose there will be no particular objection to leaving it if I can have it back tomorrow, but in the custody of the Court.

COURT: You can leave it with the reporter.

Copy of manifest "Claimant's Exhibit 5."

(Witness excused.)

CAPTAIN JOSEPH LEBaupIN. Resumes the stand.

Direct Examination Continued.

(Questions by Mr. McCAMANT):

Q. Captain, what was the weather on the 13th of May?

A. The sea was still high, and the rolling continues, and the deck is completely flooded.

Q. What were the conditions on the 20th of May?

A. The weather is fairly good, but the rolling is very severe, because the night before we had a big storm.

Q. What was that day I asked?

A. The 20th.

Q. I didn't ask about the 14th of May, I believe, did I?

Mr. WOOD: No, you didn't.

Q. State what the conditions were on the 14th of May?

A. The weather improves considerably, and we can get on the deck, and as soon as this was possible, I made an examination of the vessel with the officers of the watch. The cement of the stanchions around the main hatch was broken, and the bulwarks have been stove—have been bent toward the main hatch, and the majority of the rivets of the stanchions have been broken in this particular place. One had entirely parted, causing considerable leak which had made an opening there during the 48 hours, during which time the storm lasted.

Q. What had been the condition of the decks with reference to the washing of water during that 48 hours?

A. During this 48 hours the decks were completely flooded, and it was impossible for anybody to be on deck.

Q. Would it have been possible to make any repairs prior to the time when this examination was made?

A. It was impossible, and besides I didn't know on account of inability to get on the deck.

Q. What did you do when you found the rivet missing?

A. I closed it up immediately with wooden peg, while at the same time, I had a new rivet made; and after by visit on the deck, I went down into the hold. We have discovered several leaks as a result of the straining of the vessel. Among others, that the rivets at the foot of the stanchions and around the foot of the hatches, and also of the deck house; and because we couldn't even descend into the hold—and where the leaks were at the rivets, I had those surrounded with hemp lead and hammered the lead down. After I had them retightened, several barrels of cement, which had gotten loose, were restowed and refastened; and I also discovered that a few cases of whiskey had become wet, and an increase in the water in the pump.

Q. Did you work the pumps?

A. Yes. Yes, on account of the rolling of the vessel, I couldn't yet discover any more than 15 or 20

centimeters, and the next day when the weather was lying straighter, didn't roll so much, I found 20 centimeters. So, with the entire crew, I had as much water pumped out as possible, and because I couldn't get enough water out of the hold, I had the donkey engine lighted—the fire—so as to pump the water out with that.

Q. Did you succeed in getting the pumps clear eventually?

A. Yes, on the 18th of May, the pumps were clear.

Q. Now, generally, what was the weather between the 14th of May and the 20th of May?

A. Well, that is the same weather. We had about two or three severe blows during the week.

Q. State how the weather which you encountered between the 29th of April and the 20th of May compared with other weather that you had struck in your experience as a seafaring man?

A. As far as I am personally concerned, I never saw such severe weather, and such severe storms, and high seas as on that trip, and particularly during such a long time, and all the men on board agreed—were of the same opinion.

Q. Well, what the other men said will not be competent. State whether or not these weather conditions were the ordinary stress of weather that a ship ordinarily expects in making that voyage, or whether they were other and different from the ordinary conditions.

A. It was a bad series—a continued series of bad

weather. And I never saw it last so long, at one stretch.

Q. Now, when did the vessel get to Hobarttown?

A. 29th of May.

Q. What was done with the disabled members of the crew?

A. The three men that were injured were immediately taken to the hospital.

Q. What was done with reference to repairs on the vessel when she reached Hobart?

A. As soon as the ship had thoroughly dried out, I tried the pumps, to find if they were clear, and otherwise how much water there was in the hold, and to find out if there was any increase in the water. All the rivets and stanchions had been repaired, and in order to examine the leaks in the deck, we had fire hose turned on the deck, and one of the mates was set down in the hold to see if there was any leaks, and in those places where any leak was suspected, or noticed, the deck was entirely recaulked in that place. All the hatches were opened to let the cargo, or let the hold dry out, and we restowed the cargo where it was necessary; the barrels that were loose were restowed.

Q. When did you leave Hobart?

A. The fifth of June.

Q. What was the condition on the 9th of June as to the weather or the sea?

A. Severe blow of the wind. The sea was very rough, and the vessel pitches and rolls, and the deck is constantly covered with water.

Q. What were the conditions on the 10th of June?

A. Storm continues. The wind is blowing a gale, and the water is swept over the sea like steam or smoke.

Q. Over the sea or over the ship?

A. Over the sea. The vessel strains severely; the entire day the same condition.

Q. Was it possible to stay on deck that day?

A. No. No, it was impossible to be on deck.

Q. What, in a general way, were the conditions as to the weather between the 10th of June and the 1st of July?

A. More or less the same condition as before—severe rolling and heavy blowing and high seas, and about two severe—off and on a little good weather.

Q. Take the voyage in general from Antwerp to Portland, and state how it compared in the stress of weather which you encountered, with other voyages which you have taken.

A. It was the first time that I rounded Cape of Good Hope, and I came around Cape Horn sixteen times, and I never saw such bad weather as on this trip.

Q. Which Cape is ordinarily more stormy to round Cape of Good Hope or Cape Horn?

A. The Cape Horn route is the worse route than Cape of Good Hope, but as a rule, you get through quicker. The bad winds last less. Cape of Good Hope you remain for three months in bad weather, or in bad winds.

Q. When did you arrive at Portland at the end of

that voyage?

Interpreter: He hasn't got the last log book. Have you got it? Or no, the last log book, I think remained on the ship.

A. I believe the 20th of August, 1909.

Q. Did you carry a cargo in the Babin Chevaye from Portland to Europe, when you left in the fall of 1909?

A. Yes, full cargo of wheat.

Q. In what condition did that cargo arrive at its destination in Europe?

A. Splendid condition.

Q. Did you carry a cargo from Europe to Portland on the next voyage of the Babin Chevaye?

A. Yes, cement for Meyer, Wilson & Company.

Q. These same libellants?

A. Yes, the same receivers.

Q. In what condition was that cargo when it arrived in Portland?

A. Very good condition. I believe that claim was made for only three barrels, and without having any wet barrels.

Q. Did you carry a cargo on the Babin Chevaye on the return trip to Europe from that time?

A. Yes, again a cargo of wheat.

Q. What condition did that cargo arrive at its destination in Europe?

A. Also in splendid condition.

Q. What Cape did you round on these voyages that I have last asked you about?

A. Yes, Cape Horn each voyage.

Q. Cape Horne each voyage. Captain, what was the condition of the iron and steel in the cargo of the Babin Chevaye on the voyage in question at the time the vessel received it, if you know?

A. More or less rust, but the rust was of such a nature that in passing over it with your hand, it would wipe off.

Q. Have you the original protest, Mr. Wood, that was given to your agents at the time?

Mr. WOOD: I think so.

Mr. McCAMANT: Or will you admit that is a translation of it? That is all I want.

Mr. WOOD: Yes, I admit the translation. I object to it, though, as incompetent, immaterial and irrelevant.

Mr. McCAMANT: You admit that this is the translation of a protest that was left with your agent at Antwerp by the master of the Babin Chevaye, at the time this cargo was loaded, do you?

Mr. WOOD: Not an admiralty protest, but the legal protest or objection made. I object to, it, however, as incompetent, immaterial and irrelevant.

Mr. McCAMANT: You don't object to the translation going in instead of the original?

Mr. WOOD: No, not at all. Here is the original.

Mr. McCAMANT: I don't care, if we have the translation. I suppose this captain doesn't know about that, for it was his predecessor in interest. It wasn't Captain Lebeauvin.

Protest marked "Claimant's Exhibit 6."

Cross Examination.

(Questions by Mr. WOOD):

Q. Captain, how old are you.

A. 29.

Q. Are you living here in Portland now?

A. Yes.

Q. How long have you been living here?

A. About eight months.

Q. When did you quit the sea?

A. About ten months ago.

Q. When did you first go to sea?

A. In 1896—'95.

Q. In what capacity?

A. As ship's boy.

Q. And when did you become an officer?

A. When I was 18 years old.

Q. After how many years' service?

A. It makes five and a half or six years.

Q. And what officer?

A. I had charge of the watch, and under the surveillance of the captain and the captain and myself were at the same time on the bridge on the first voyage.

Q. What would be the title?

A. Second mate.

Q. And when did you become master, or captain?

A. I was 24½ years old when I took the command of the Bayare.

Q. And how long had you been in service when

you took command of the Babin Chevaye for this voyage?

Interpreter: You mean command?

Q. Yes, this voyage in question at Antwerp; when he took command of the Babin Chevaye at Antwerp, how long had his service been?

A. Eight years.

Q. The Babin Chevaye is a steel ship, isn't she?

A. Yes.

Q. Wooden decks?

A. Yes, reinforced with iron at different places.

Q. How do you know her age?

A. According to the papers on board the ship.

Mr. WOOD: I move to strike out the captain's testimony about her age as incompetent.

Q. When you took charge of her at Antwerp, how much cargo was in her, if any?

A. About 450 tons, the stiffening.

Q. What did the stiffening consist of?

A. Iron.

Q. You were not present all the time that she was being loaded, were you?

A. Not all the time, but I went on board about three times in the morning, and three times in the afternoon, or more, if required.

Q. Without reference to any plates or diagram, can you give from memory where the beam or girders or structural iron was stowed?

A. All the flat iron was between decks from the main mast on.

Q. From the main mast forward?

A. From the main mast forward.

Q. Where were the beams—iron beams, girders, or structural iron?

A. They were on both sides of between decks alongside the ship.

Q. Then there was no plate iron and no iron girders, or beams, in the lower hold?

A. Yes, of the structural iron there were also in the hold, but no plate iron.

Q. So that the structural iron was divided between the between decks and the hold?

A. Yes.

Q. About how many tons in the between decks?

A. That is what I don't remember.

Q. Do you remember about how many tons there were all together, of the structural iron?

A. No, I don't know anything about it.

Q. The bar or rod iron was in the lower hold for stiffening, was it?

A. Yes, they were in the hold for stiffening.

Q. In what part of the hold?

A. Oh, exactly under the main hatch.

Q. And right against the skin of the ship—the lowest part of the cargo?

A. With wooden boards between it, so they wouldn't be on top of each other.

Q. Yes, but they were the lowest part of the cargo?

A. Yes, absolutely at the bottom.

Q. Was there any cement in the lower hold?

A. Yes, on top of the iron and also the pig iron.

Q. About what proportion of the cement was in the lower hold?

A. I don't remember any figures. I would have to consult the tally clerk's book.

Q. Well, would you say there was more than half?

A. I couldn't say that.

Q. How was it stowed in the lower hold as to running fore and aft?

A. Fore and aft there were two bulkheads to separate the coke.

Q. Separate the coke?

A. The coke from other merchandise.

Q. But I want to get the location of the cement in regard to whether it was in the after part of the hold or the forward part of the hold.

A. It was in the center, because fore and aft was coke.

Q. Is that true of between decks?

A. In between decks the cement was forward, and the furtherest part aft, because in between were the other merchandise, the ochre, etc., forward of the main hatch.

Q. After the big wave took you on the 6th of May, you said you found some of the after part of the cement was wet. Is that true?

A. Yes, I swear that.

Q. And where was this wet cement—in between decks, or in the lower hold?

A. It was, of course, in between decks, because it was impossible to get down in the hold.

Q. Why impossible?

A. Because it was absolutely closed and filled up—absolutely closed.

Q. Was the lower hold filled clear chock up to the beams of between decks?

A. No, there was some room left.

Q. But not enough room to get down on the cargo?

A. There is no way of getting down into the hold unless I would have removed four or five tiers of cement.

Q. How much air space was left in the lower hold below the bottom of between decks?

A. Pretty hard to say how much space, but you had to crawl on your knees to get through, and some times even absolutely fail to crawl through.

Q. And how much—was the between decks filled chock-a-block up to the main deck?

A. What I just mentioned referred to the between decks.

Interpreter: He apparently misunderstood.

Q. Then I will have to go back and ask about the lower hold. Was there any air space left on top of the cargo in the lower hold?

A. Yes, there was space. I don't know how much space there was, but there must have been some space, because once in a while I could hear some of the barrels move. There was some space.

Q. In your judgment, as an expert mariner, was there sufficient air space left in the hold to provide buoyancy for the ship?

A. Oh yes, there was plenty. There was plenty of space, and even in certain places, one could stand up erect, because the cement was stowed in different tiers in a pyramid form.

Q. What I am trying to get at to make it clear, is the seaworthiness of the ship in regard to buoyancy.

A. Well, there was plenty of air. There was plenty of space, and those funnels, or those air pipes to bring in the air from the deck and down into the hold.

Q. Put it another way. Suppose the deck houses had been swept clear and everything swept clean off the deck, but the main deck had held tight, and no leaks in the vessel, would she have floated?

A. Yes, of course she would have floated.

Q. The main deck is the roof of the ship, isn't it?

A. Yes.

Q. What cargo did she have in her just before you loaded with this cargo in question at Antwerp? Nitrates wasn't it?

A. Yes.

Q. And was there any sawdust put in the vessel?

A. Yes, enormous quantity.

Q. What for?

A. To dry out thoroughly the wood.

Q. And there was still nitrate to be cleaned out of her here in Portland before she took in the wheat, wasn't there?

A. Not that I remember.

Q. Now, what examination did you personally

make of the decks of the Babin Chevaye at Antwerp?

A. I went together—was accompanied by my first mate, and we went over the entire deck from fore to aft; we went over all the seams, and if there was a seam that appeared doubtful, I made an incision with my knife to find if the oakum was in good condition, or needed repairing, and if there was a soft place, I went down in the hold to see if there was a leak.

Q. You didn't trust to the Bureau Veritas Surveyor, then?

A. The survey was by the surveyor of the Bureau Veritas—was made under his predecessor. (Interpreter uses pronoun "his").

Q. I say he didn't depend on that?

A. When a captain takes command of a vessel, he always goes over the ship to find out in what condition the vessel is.

Q. Well, I would like to ask him if he paid any attention or thought that the Bureau Veritas survey was of any value, if he paid any attention to it himself.

A. Yes, I attached value to his report, but I didn't have that at the time. I didn't get that report until the vessel is ready to sail, because the Bureau Veritas has not only orders to repair, but has also seen to it that the repairs are executed.

Q. The purpose of the Bureau Veritas is to give class for marine insurance, isn't it?

Mr. McCAMANT: I object to that as not proper

cross examination. This witness has not been examined on the Bureau Veritas in any way.

Mr. WOOD: Well, I can ask that as of an expert.

COURT: I think it is proper to ask him.

(Question read as follows: The purpose of the Bureau Veritas is to give class for marine insurance, isn't it?)

A. Yes, for that purpose and probably for some others. I haven't particularly looked into that, what the different reasons were. For the safety of the vessel.

Q. Now, you have described your voyage. I wish you would say in a general way what was the—what place and time was the worst weather you had?

A. The 6th and the 12th of May—those were the two worst days; to find out the location I would have to refer to the log book.

Q. In testifying about this weather, you practically read from the log, didn't you, except part of the time when you were telling about the big wave on the 6th of May?

A. Yes, that is correct.

Q. How long a time would you say from your memory that the bad weather lasted on this voyage taken as a whole—the period of bad weather?

A. From the first week in April until the first week in June.

Q. And how much of that time were you off your course by reason of the weather?

A. On an average of one or two bad, very bad

days a week. I want to say that with some wind, I didn't follow the course, or the ship didn't follow the proper course, but she was proceeding all right, only not in the course that we wanted the ship to pursue.

Q. You extended admiralty protest here in Portland after you arrived on that voyage, didn't you?

A. Yes.

Q. What was the purpose of that protest?

A. To cover damages.

Q. And it is taken from the log, isn't it?

A. Yes.

Q. And you put into the protest the worst weather that you encountered, didn't you?

A. Yes.

Q. And in writing up the log at sea, during bad weather, the master always has in mind damage to cargo and extending of a protest, doesn't he?

A. Yes, whenever I expect any damage I always make a protest.

Q. That isn't exactly the point. In writing up the log at sea, doesn't the master, or the officer writing the log, have in view the fact that a protest to cover damages may be made from it?

A. No, none whatever.

Q. So you don't have any—don't exaggerate the weather any?

A. No, not in the least. In fact, it is not lively enough described to express the real condition.

Q. Now, can he express it any livelier now from memory, because he has permission to go ahead if he wants to?

A. I couldn't invent any other words than the French are using for that purpose.

Q. Have you a copy of the protest you made here in Portland?

Mr. McCAMANT: I have.

Mr. WOOD: May I have it?

Mr. McCAMANT: Certainly.

Q. By the way, before I forget it, you say you tried the seams of the main deck in Antwerp with your knife. You mean just common pocket knife?

A. Pocket knife, yes.

Q. And did you find any soft spots at all?

A. No.

Q. You did not. Did you try the poop deck in Antwerp?

A. Yes, the same way.

Q. Didn't find any necessity for repairs there either?

A. No.

Q. Now, in your protest, the first bad seams to be about the 18th of April, and I think that coincides with the dates when counsel examined you—April 18th. About what velocity or rate of wind was blowing that day—no, without the log, please. You have been over that—just the same as counsel asked you.

COURT: What date do you ask—April 18th?

Mr. WOOD: Yes.

A. Without my log book, I wouldn't even know if it were even bad weather on that day.

Q. Then take your log book and see what the

wind was.

A. The force of the wind is figured from—we figure from zero to twelve, and this is marked on this day four. Here in the front of the log book the explanation is given—four means nice breeze.

Q. What does twelve mean?

A. Tempest.

Q. What does eight mean?

A. Light blow.

Q. I would like to ask just one more question on this day.

COURT: What is that?

Zero means no wind at all, I suppose?

Interpreter: Almost calm—slight breeze.

COURT: They keep the velocity of the wind in figures rather than in miles, or ordinary English, whether stiff breeze or light breeze.

Q. On the 18th of April, what sail were you carrying—look at your log book?

Q. All the sails at 8 A. M., and in the evening we had all the small sails furled.

Q. Did the Babin Chevaye roll much in calm weather?

A. Yes, whenever there was high seas.

Q. Well, I mean when there wasn't high seas did she roll?

A. No, she behaved very well.

Whereupon proceedings herein were adjourned until Saturday, April 7, 1912, 10 A. M.

Portland, Oregon, Saturday, April 7, 1912, 10 A. M.

CAPTAIN JOSEPH LEBEAUPIN. Resumes the stand.

Cross Examination Continued.

(Questions by Mr. WOOD):

Q. Captain Lebeaupin, look at your log, unless you know independently of it, and tell me what was the force of the wind on the 19th of April?

A. In the morning it was marked three; at night seven.

Q. And what sail did you carry that day?

A. In the morning we had all the sails up. We furled the gaff top sail and the spanker and all the small staysails, the fore and main royal, and the flying gib.

Q. You say that you read over and signed up this log yourself every day? Is that so?

A. Yes.

Q. Now, during the remainder of April, up to the 29th, you made no note in your protest, so I presume that the weather during that period was not in any way exceptional.

Mr. McCAMANT: Take your time, and look it up and be sure.

Mr. WOOD: No, I would rather have him answer. He can answer that without looking at his log. I want to know.

Mr. McCAMANT: He has a right to look at the log, I submit, if he wants to.

Mr. WOOD: Also I have a right to first try him out without the log. Just generally speaking, now,

after this 19th of April that you have just talked about, until the end of April, was the weather exceptional or not?

A. No, nothing extraordinary.

Q. Then the next date that you have entered in your protest is the 29th of April. Now, look at that date and tell me what the force of the wind was, and what sails you were carrying.

A. In the morning it was four, and at night it was nine. In the morning we had furled the main sail, the spanker, and the two gaff top sails. At 8 A. M., we furled the royals and the foresail, and the flying gib in order to tack. Between 8 A. M., and noon, we furled the main top gallant sail and the fore top mast staysail. From five to eight P. M. we furled the upper main topsail, and after tacking, we have to put back the foresail, so that in the evening we were sailing under the foresail, the lower fore topsail, and the lower main topsail, and the fore top mast staysail, the main top mast staysail and the mizzen staysail.

Q. Then in the morning you were carrying full sail?

A. Yes.

Q. And during the day you took in the sails you have mentioned?

A. Yes.

Q. And it left you finally with the canvas you have last named?

A. Yes.

Q. Now, May 1st, is another one of the dates in your protest, and on it you were examined, and I

would like you to state on that day also, the wind and the sails carried.

A. In the morning it was eight, nine towards noon, and evening went down to two.

Q. Now, give me the sails. I will tell you, it will be enough if you give me the minimum sail you carried, the lowest sail to which you reduced the ship.

A. When the wind was strongest, we had the foresail, the lower fore topsail, and the upper main topsail, the fore top mast staysail, the main top mast staysail, and the mizzen staysail. That is all the sail.

Q. And you had been carrying full sail, and took it in to this extent?

A. You mean the day before?

Q. No, I am talking about this day—May the first.

A. It was at 1 A. M. on the 1st of May—the day's run from midnight until noon.

Q. Now, on the 2nd of May, what was the wind, and what sail were you carrying?

A. At 1 A. M. it was two, at noon it was seven, and in the evening, it was six to five.

Q. About the sails.

A. At what time of the day?

Q. During the greatest strength of the wind—the minimum amount of sail.

A. When the wind was strongest we had the same sails as mentioned on the day before, and in the evening we added another sail to it.

Q. Well now, I don't care to take that up day by

day. I will get down to this most difficult time. I understood him to say that the worst weather they encountered was the 5th and 6th of May. Was that right?

Mr. McCAMANT: The 12th of May didn't he say?

A. It started on the 4th of May and continued on the 6th, started the evening of the 4th.

Q. Well, what I am trying to get at, was that the worst weather of the voyage? That is what I am trying to find out.

A. I believe that on the 12th the weather was the worst.

Q. And this was the next worst, was it?

A. Yes.

Q. Well, then, take it on the 4th, as he says it began then, what was it that date—the strength of the wind?

A. At 1 A. M. it was three, and at night i twas nine.

Q. What would you call nine in language? Let him state it in the French language without the use of the book.

A. Coup de vent.

Q. And how would you translate that in English?

Interpreter: Well, I will have to look it up and get you the exact term.

Q. It simply means a stroke of the wind, doesn't it—blow of the wind, literally?

A. Strong gale.

Q. Strong gale. Now, what term does he have for the strength of the wind next below that, less? What French term?

A. Fresh gale.

Q. Let's have in the record the meaning of the numbers. I was trying to get the nautical phrase.

Interpreter: It is the same thing in the book here. Zero is calm; one, light air; two, light breeze; three, gentle breeze; four, moderate breeze; five, fresh breeze; six, strong breeze; seven, moderate gale; eight, fresh gale; nine, strong gale; ten, whole gale; eleven, storm; and twelve, hurricane. The printed part in the log book gives twelve as hurricane, and impossible to carry sails.

Q. What is the French for ten?

A. Fort coup de vent.

Q. And for eleven?

A. Tempete.

Q. So that you don't reach what is called a storm until you get above nine, do you?

A. Seven is practically the commencement of the storm, and is severe enough to commence the straining of the vessel.

Q. Seven is the commencement of the gale, in the English language?

A. Yes.

Q. Now, isn't it a fact, Captain, that the weather that is called a gale is, by mariners, considered good sailing weather, because it puts the ship along on her voyage?

A. Yes, it is good weather for a ship provided the

winds are favorable. If they are not favorable, it is bad weather. When the winds are favorable, it is more dangerous for the vessel than the winds would be opposite, on account of her going with the wind.

Q. What is that?

A. When the vessel is closest to the wind, she has no speed whatever, one or two knots and the she doesn't move, and is protected by her displacement, and is practically drifting. And whereas, when a vessel is scudding or said to scud—

Q. Before the wind?

A. When running before a heavy storm, with little or no sail set, there is nothing to protect her against the waves.

Q. Now, as I understand that former answer, it was when he had a favorable wind,—when it was favorable, the strain on the vessel was most.

A. When the wind comes from behind, and is blowing in the sail, there is nothing to support the vessel. She just flies before the storm.

Q. So that when—when she is running before the wind, that is then the greatest strain on her, is it?

A. I don't believe that a vessel would strain any more in that position, but it is more dangerous for the vessel.

Q. Now, ask him if he knows who translated this protest—extended it?

A. Mr. Matthes.

Q. (To interpreter). You did?

Interpreter: Yes, I did.

Q. Ask him what the intended meaning of that

word squall is—squally and squall.

A. It is a sudden increase in the strength of the wind, accompanied by rain, thunder and lightning.

Q. About what would he put the strength of the wind in a squall, in numbers?

A. If the wind is before the squall, three, the velocity of the wind will be—it will increase to nine or ten suddenly.

Q. Then what is the difference between a squall and a gale, as far as the force of the wind is concerned?

A. The difference between a gale and a squall, is that a gale blows continuously, or for some time, whereas the squall suddenly comes up, and suddenly dies down.

Q. Now, I really forget myself: Has he given the lowest amount of sail carried on the 5th of May just before this accident?

COURT: No, the last date was the 2nd of May, that you asked about.

Q. Now, give me the amount of sail that was carried on the 5th of May, the day before the accident.

COURT: He didn't give the amount of sail carried on the 4th either, Colonel.

Mr. WOOD: Well, personally I don't think that is of any consequence.

A. From early in the morning, or from 1 A. M., the vessel sailed under lower fore topsail, the foresail, the lower main topsail, and the upper main topsail.

Q. The 5th was worse than the 4th, wasn't it, of May?

A. On the evening of the 4th the wind blew from nine to ten ; blew nine and during the 5th it blew from nine to ten ; was more or less the same.

Q. Then give me the sail carried on the 4th—the minimum?

A. The same sail with the addition of the upper fore topsail.

Q. Captain, on the 5th of May, Judging by the protest, is the first entry in the log, that you were steering with the waves, to avoid accident it says here. Is that in fact the first time that you left your course in order to prevent accidents to the ship, and steered with the waves?

A. Yes, it was the first time that I absolutely went with the wind, but some times I have been obliged to go about a quarter out of the way, but on this day, I couldn't make any other maneuvers.

Q. Did you run before the wind, or with the waves on the 6th of May? I know he did, because that is the day he pooped. You asked him that?

A. Yes.

Q. And now give us the strength of the wind on that day. I think he has already said, though, from nine to ten.

Mr. McCAMANT: 6th of May?

A. On the 6th was from ten to eleven.

Q. Now, give me the sail carried, will you?

A. The same sails—the same sails as on the 5th—on the evening of the 5th. If you like, I will repeat them.

Q. I wish you would, more for my own memory.

A. The foresail, the lower fore topsail, the mizzen middle staysail, and the mizzen top mast staysail.

Q. What time of the day was it this big wave came aboard?

A. Between three and four P. M.

Q. Now, as I understand it, you had put on the main hatch some spars as kind of a break water, and these spars were carried away, but the triple hatch covering was left untouched?

A. Yes, that is right.

Q. The other hatches remained water tight and well covered?

A. Yes, the other two.

Q. What is the name of this hatch in the store-room which was left open?

A. It is called the hatchway of the sail room.

Q. Will you point this out to the Court and to me too?

A. On each side of the vessel there is a small hatch like that.

Q. And were they both open?

A. The one in the sail room was open, but the other one was closed, but not secured or not water tight.

Mr. McCAMANT: Not battened down?

A. Not battened down.

Q. And those go through the main deck, do they?

A. Yes.

Q. Trace the path of the water from the big wave through the chart room—how it would reach this hatch.

A. Smash in this door here, and this, the inside wall, and into the chart room, fill up the chart room, went down the staircase, filled up all the saloon and the apartments here and the storeroom, came down that little hatch into the sail room, and followed along the iron plates there between decks, dispersed in the hold.

Q. Now, Captain, had you anticipated all of your upper works being carried away, and the sea constantly breaking over you here, you would have had that hatch closed, wouldn't you?

Mr. McCAMANT: Objected to as irrelevant and immaterial. We couldn't be held liable in any event for an error of judgment. The question of what he would have done on another state of facts, throws no light on this controversy.

COURT: It may go in the record for whatever it is worth. We are entitled to have the record in this character of case.

A. If that would have happened, why the chances are that the whole vessel would have gone down.

Q. Yes. I want to try though, to get my point clear before you: To prevent the wrecking and foundering of the vessel, the main deck must be kept absolutely tight, so that her whole superstructure could be washed off, and yet no hole through the main deck for the water; then the buoyancy of the hull itself would keep her afloat. But, if the hatch is left open, that allows the sea to fill up the hold, and she is bound to founder. That is my point. I would like to get it.

A. I don't think so that the ship would. That was

not anticipated by the constructors or builders of the vessel. The vessel is supposed to sail as she is built, with hatches and superstructures.

Q. Well, couldn't you make those two hatches water tight?

A. You would have to make changes.

Q. In the ship?

A. They are on the same level as the deck, so I can't put any air tightning on it unless I would nail it down, but then it would prevent me from getting down there to get my provisions.

Q. No combing then?

A. No.

Q. You had free board, did you not, on this voyage. I think in a former deposition you give it.

A. Yes, I gave it.

Q. I didn't catch it here, but I am pretty sure it was in. Well, can you give a rough idea?

A. I think it is about one meter; that is about three and a half feet.

Q. And how high was the rail above the main deck 3½ feet or four feet?

A. About five feet.

Q. The buoyancy of the vessel for keeping her afloat at sea all depends on the air space between the main deck—below the main deck, doesn't it?

A. I am not an architectural engineer, and I can't answer that question.

Q. Well, I can make that argument to the Court, I suppose, just as well; illustrate it with a bottle with a cork in it. On this day of the 6th of May, how many

of the crew were on deck in the afternoon, when the large wave came aboard?

A. Two at the wheel, two next to it, the officer of the watch and the second boatswain, and two men in front of the chart room. That is eight all told.

Q. What were they doing? Their duties?

A. They were on the watch on the poop deck.

Q. There were two at the wheel steering?

A. Yes, two were at the wheel steering the vessel.

Q. The two in front of the chart room—what were they doing?

A. That is their place they keep when being on watch.

Q. And where were the others—I have forgotten?

A. The others were next to the wheel—close to the wheel.

Q. How many?

A. Two.

Q. That is six. Then where were the other two?

A. The officer of the watch and the second boatswain.

Q. Was that the entire watch on deck?

A. Another man was just down in the sail room to get additional sail.

Q. What was he going to do with them?

A. He went down there to get material to fix the sails that had torn loose, so as to attach them again to the stays.

Q. Just doing general repair work, was he?

A. At the time he was not making any repairs. He had gone down stairs to get—

Q. I understand that. What I mean is this: Was he fixing up some sails for emergency, or was he just going to do general repair work?

A. No, it was an emergency, because he had to fix the lower fore topsail. Otherwise, if it hadn't been fixed, it would have carried away.

Q. That is the lower fore topsail that was already spread?

A. Yes, yes, but the stays of the sail had torn loose somewhat.

Q. Was he going aloft to do it?

A. No. I said that he was in the sail room to get the necessary material to fix it.

Q. Then was he going aloft to fix it?

A. Yes, after we had saved the injured, about one or two hours later.

Q. But this was before the accident happened, as I understand it, that he went down for the material, before the wave came over.

A. Yes, but the man was in the sail room just when the wave came on board.

Q. Exactly. Now then, without any regard to the wave coming on board—I don't care about that—had he gone down to get the material, and if the wave hadn't come aboard, was he going to go back and go aloft, and fix the sail?

A. Yes, certainly. He had been ordered to do that.

Q. Were these men lashed to the wheel?

A. No.

Q. Well, the weather wasn't such that you anticipated being pooped by this wave, was it?

A. No, because even the two men that were close to the wheel were there on their own account, and were even amusing themselves by looking at the waves.

Q. Were regular meals served aboard that day?

A. I was too busy to remember. I presume that you haven't got the slightest idea what it means when such an accident happens. It was a regular hospital. There were three men wounded, and the water was running through all the quarters, and everybody desperate, and practically—particularly the young fellows lost their heads and cried.

Q. Now, he probably has got his mind on a different point than I have. Was breakfast served that day?

A. Yes, breakfast was served.

Q. This accident didn't happen until between three and four?

A. Yes.

Q. Was the mid-day meal served that day?

A. It was served, but I don't remember at what time.

Q. I don't care at about what time. Was there any supper served that day after the accident?

A. Yes.

Q. Were those meals prepared in the galley?

A. Canned goods were served, because everything else was floating in the water.

Q. At the time of the wave?

A. Yes.

Q. Now, did you sign up this log—read it over that day?

A. Yes, it was my own handwriting.

Q. What time of the day?

A. In the evening when I saw the whole vessel was more or less in order.

Q. Now, on the next day—the 7th of May—the weather improved, as I understand it?

A. Yes, a good deal, but the sea remained high—very high.

Q. Now, on the 8th of May. Wait a minute, on the 7th of May, what was the force of the wind, and what sail did you carry?

A. At 1 A. M. it was ten, and the evening it was five.

Q. And what sails?

A. The same sails as the night before, on account of bad weather. It takes some time to put back the sails.

Q. On the 8th of May what was the wind, and what sails was she carrying?

A. It varies from eight to nine.

Q. And the sail?

A. In addition to the sail we had the upper fore topsail.

Q. And on the 9th of May? What was the force of the wind, and what sails did you carry?

A. Varies from seven to six.

Q. And what sail did you carry?

A. We put in place the lower top gallant sail.

Q. On the 10th of May, you opened the hatch to inspect the hold, so the weather must have been much better that day.

A. Yes.

Q. And now, as I understand it, you thought the 12th of May was even worse than the 6th. Is that correct?

A. The main difference is that having the wind from behind the vessel, can carry much more sail than if the wind comes from the side or in front, because the speed of the vessel—because when the wind blows from the side, the speed is checked, and—

Interpreter: I think I have made a mistake probably.

A. When the ship is going with the wind, which, say, is blowing at 20 knots an hour, and the vessel is going 10 knots an hour, then the vessel only experiences a speed of ten knots, or a force of ten knots; whereas, if the wind comes from the side, and the force of the wind is 20 knots, and the vessel goes at 10 knots, she has to overcome a force of 30 knots an hour, and that is why the vessel strains more.

Q. Well, I am perfectly willing for him to make any explanation, but that doesn't answer my question. In the first place, I don't think he has answered yet, whether, comparatively speaking, he considered the 12th of May worse than the 5th and 6th.

A. Because on the 12th I went against the wind.

Q. Well, does he? While that infers that he does, he hasn't said yes or no. Does he consider the 12th

worse than the 5th or 6th?

A. Yes, because the vessel experienced—

Q. He can make any explanation he wants to, but I understand it. I think he has made it. On the 12th, he was not running before the wind.

A. No, on the 12th I went against the wind. Kind of against the waves.

Q. Did you keep your course on the 12th?

A. No, I went as close to the wind as possible.

Q. What was the strength of the wind on the 12th and what sail was carried?

A. In the morning it was nine, and at night it was eleven. The foresail, the lower fore topsail, the lower main topsail and the fore top mast staysail.

Q. Now, in your protest here, for the 12th of May you don't say that you abandoned your course to prevent accidents to the ship, but you just now said that you ran as close to the wind as possible. What I want to know is whether you were still making any headway on your course at all—any headway at all?

A. On that day I didn't pay any attention to making any progress. I just did everything to keep the vessel in the easiest position.

Q. Then why didn't you run before the wind as you did on the 6th of May?

A. Because I would probably have gone to the South Pole.

Q. Too much out of the course. Now, how long did this severe weather last? This severe weather of the 12th of May—how long did it last?

A. Lasted about 24 hours.

Q. I see there is no entry in the protest of the 13th of May, so I presume on that day things had abated. Is that right?

A. Yes, the weather improved considerably.

Q. What time did you reach Hobart? I think you have said—it is here in the protest the 30th of May. I guess you said it anyway. Is that right—the 30th of May? You might look at the 30th of May.

A. Yes, that is right.

Q. Now, is it a fact that I have examined you on really the worst weather of the voyage?

A. Yes, on those two days. On those two days it was the worst, but on an average, I had two or three a week of lesser degree.

Q. And did you say on your direct examination that in rounding the Cape of Good Hope, bad weather was to be expected for a longer period than at the Horn?

A. Yes, I confirm it.

Q. That is the usual expectation?

A. Yes.

Q. And when you left Antwerp, you knew you were going to round the Cape of Good Hope?

A. Yes.

Q. Now, Captain, is it anything unusual for a ship to have her decks completely flooded?

A. Yes, of the kind, or in the way I was on those two days, because I didn't know whether the sea was coming on board, or was washing overboard. The vessel was absolutely under water, and only the superstructure was outside.

Q. But is it anything unusual for a ship's deck to be flooded by the sea?

A. It requires bad weather to ship water.

Q. I know it, but I will have to get at it another way. Did you ever make a voyage around the Horn without seeing the decks flooded?

A. No.

Q. So it is not an unusual thing for a vessel going to sea to have her decks flooded?

A. No, that isn't.

Q. So I understand, then, what you claim was the extent of time, the long duration of time of bad weather that you had, and on these two days of the 5th and 6th of May, the depth of the water that was constantly on the deck. Is that a fair statement?

A. Yes, the quantities of water shipped on that day, and that was on the deck, was unusual, extraordinary.

Q. And the length of time I understand?

A. Yes.

Q. When these extraordinary and unusual quantities of water were shipped, where were the crews on this particular 6th of May? I don't mean, now, the great wave, but on the decks constantly. Where were the crew during that time?

A. On the poop deck.

Q. This flooding was confined, then, to the waist of the ship was it?

A. Yes, if it had been the case—this had been the case on the poop deck, why the whole vessel would have gone down.

Q. I didn't mean just the poop deck. I mean the waist of the ship—that is the middle of the main deck?

A. Yes.

Q. What caulking did you do when you got to Hobarttown on the main deck? As to quantity. Just state how many places you recaulked?

A. On the starboard side in some places, and around the hatches where I thought were leaks.

Q. Many places on the starboard side?

A. No, just off the main hatch.

Q. And you recaulked the poop deck entirely, as I understand it.

A. No, I never said that.

Q. Well state what the facts are, then?

A. I did not caulk the poop deck in Hobart,—merely on the voyage when we were in the Equatorial regions, where slight repairs were required.

Q. And did you do any caulking after leaving Hobart—between Hobart and Portland?

A. Once a week I sent my first mate over the deck—once a week I sent my first boatswain over the deck to do whatever caulking was necessary.

Q. What I am trying to get at was how much caulking was actually done.

A. I didn't—I can't say in what places. In small places probably here and there, wherever it was required in the usual upkeep.

Q. Well, was there much done or little?

A. Very little.

Q. When you reached Portland, and preparatory to taking your cargo of wheat, you were ordered to

have your whole deck recaulked, were you not?

A. Yes.

Q. Who did the job?

A. Anderson & Crowe.

Q. How many voyages did you make on this ship after this voyage in question, until you left the sea?

A. I returned in the vessel to Europe, and made one more round trip.

Q. In the same vessel?

A. In the same vessel.

Q. And what kind of weather did you have rounding the Horn?

A. I don't remember that.

Q. Well, had the usual weather?

A. Not too unfavorable.

Q. Rounded the Horn three times, didn't you?

A. Yes, three times after that voyage.

Q. Well now, would you say now that all three of those voyages around the Horn were exceptionally favorable, or the average weather?

A. Nothing to be compared with the trip I made on the voyage in question.

Q. Well, that is all right, too, but I want to know whether the weather you made on the Horn voyage was average Horn weather, or if all three of them were unusually favorable.

A. Yes, they were ordinary weather one may expect to round Cape Horn.

Q. What is the ordinary length of time of a voyage from Antwerp to Hobart?

A. It ranges from 75 to 120 days, and the average is three months.

Q. About how was this voyage?

A. 95.

Q. About an average voyage?

A. Yes.

Q. And what is the average time from Hobart to Portland?

A. I only made the trip once from Hobart, but I believe from two to three months.

Redirect Examination.

Q. Captain, how did the force of wind that you struck on those two days, May 6th and May 12th, compare with the force of wind that you would strike on the average voyage, either around the Cape of Good Hope or Cape Horn?

A. On the 6th and the 12th the velocity reached eleven, whereas very rarely it exceeds nine or ten, on an average voyage.

Q. Do I understand you to say that when the velocity reaches twelve, it is not possible for the ship to carry any sails?

A. When the wind attains twelve, it is practically a cyclone, and carries all the sails away. Only once I was in a cyclone, and I saw it.

Q. You say that in addition to the severe weather that you have testified particularly about, you have had two or three a week. Two or three what, do you mean?

A. I mean by that that we had two or three times a week, very bad weather, with high velocity.

Q. Did that continue during a considerable portion of the voyage from Hobart to Portland?

A. During one month after my departure—after I sailed from Hobart, and on account of the damage sustained by my vessel, I have not followed the usual course of south of Tasmania, but I went north of the island where the bad weather is less frequent.

A. It was more or less the average weather, but island where the bad weather is less frequent.

Q. How did the weather on your voyage from Portland to Hobart compare with the weather that one would ordinarily strike in that latitude?

A. It was more or less the average weather, but nevertheless I experienced considerable bad weather.

Q. Did you do any caulking at all on any of the decks of the vessels, prior to the storm early in May, 1909, except the caulking of the poop deck, about which you testified on your direct examination?

A. No.

Q. Did you make any change with reference to the stowage of the cargo at any time on this voyage?

A. No, it would have been impossible.

Q. How often did Mr. Tucker visit your ship while you were in port at Portland, at the end of that voyage?

A. He has probably been two or three times on board the ship, but he was several times on the dock—perhaps twice he went down into the hold.

Q. How long did he stay when he went down into the hold?

A. Once he spent nearly an entire morning there.

Q. Did you have any conversation with Mr. Tucker with reference to who was responsible for the damage to this cargo, or any portion of it?

A. Yes.

Q. State what he said with reference to the responsibility for the damage to this cargo.

Mr. WOOD: Objected to as incompetent, irrelevant and immaterial.

Mr. McCAMANT: I suppose we will have to follow it up, in order to make it competent, and show that Mr. Tucker is the legal representative of Meyer, Wilson & Company, or is that admitted?

Mr. WOOD: That will be admitted, but I don't think it will make it competent.

COURT: Let him put it in the record.

A. Mr. Tucker came down to the vessel at the time the hatches were opened by Captain McIntosh, and the three of us found that the hatches were well closed, according also to the certificate that Captain McIntosh gave me after all the cargo was more or less discharged; he examined the entire ship; after Mr. Tucker had examined the vessel, and had seen the damage done, and read over the protest, he told me that he did not expect to make any claim on the cement because he took it for granted that it was on account of perils of the sea.

Q. Did you have any talk with Mr. Tucker after Mr. Beebe had presented a claim for damage to iron and steel?

Mr. WOOD: Objected to as immaterial, incompetent and irrelevant, and not proper cross examination, and ask to strike out this last answer as not proper cross examination.

Mr. McCAMANT: It is redirect.

Mr. WOOD: It is not proper re-direct. It does

not bear on a thing I asked.

Mr. McCAMANT: I asked permission to recall the witness for the purpose of asking him.

COURT: Let him testify.

A. Yes, and—

Q. State what he said. I will put in another question there. State what he said.

A. Mr. Tucker told me that Mr. Beebe had made a claim on the steel and iron, but that nevertheless he would make no claim because he considered it a case of peril of the sea.

Q. As a matter of fact, when did Mr. Tucker decide to present and assert a claim against the vessel with reference to the time when the cargo was discharged?

Mr. WOOD: The same objection to all of this.

A. He libelled the vessel exactly the day—or libelled the ship exactly on the date that the ship would have sailed, and six weeks after the vessel had arrived in port, and on that account the ship was detained three days.

Q. When the cement was discharged on the dock, did you examine any of the barrels for the purpose of seeing whether the barrels claimed to be damaged were in fact damaged?

A. Yes, a large quantity of barrels which had been accepted by Mr. Tucker were afterwards put aside again after Mr. Meyer had arrived from San Francisco, and several barrels that only had just a little wet spot on the wood were refused, and on opening the same, they were found to contain good cement, intact.

Q. Who opened them?

A. My first mate and myself.

Q. Did you personally see the contents of those barrels?

A. Yes, certainly.

Q. Was this a portion of the cargo that was claimed by Mr. Tucker to be damaged?

A. Mr. Tucker had accepted it, but it was Mr. Meyer who refused to accept it, and a long time after the cargo had been discharged.

Q. Were these barrels that you inspected a part of the cargo which Mr. Meyer claimed was damaged cargo?

Mr. WOOD: I would suggest that this doesn't seem to be relevant for this reason: We have put in the claim for damages as actually caused on actual sales, and just what it has to do about Mr. Meyer and a few barrels seems to me irrelevant and immaterial.

COURT: Part of the history of the case, I suppose.

A. Yes.

Recross Examination.

Q. Captain, when was it that you had this conversation with Mr. Tucker?

A. Every day I was in the office to get my freight, and he promised me that he would pay the freight without any deductions, and I went about every day, but I didn't get the freight until just a few days before I sailed, and Mr. Matthes received the freight from him.

Q. I am asking you when Mr. Tucker first told

you that he wouldn't make any claim for damaged cement?

A. At the time he received his claim from Mr. Beebe.

Q. Mr. Beebe had nothing to do with the cement.

A. Yes, but I had to do with Meyer, Wilson and Company for the entire cargo, as well cement as steel and iron.

Q. Did he say he would make no claim for the cement, because he thought it was damaged by sea peril at the time he was down with McIntosh at the time of the opening of the hatches?

A. No, I never said that.

Q. When did he say it?

A. After he had examined the vessel, and read over the protest, he told me.

Q. How much examination did he make of the vessel?

A. He just looked around and examined.

Q. Make a regular inspection of the vessel—go down in the hold and inspect the decks?

A. I don't know. I just saw him on board.

Q. Is this the protest that he read?

A. Yes.

Q. And that protest is practically what you have testified to here in this case under questions from your counsel, isn't it?

Interpreter: You mean as he was examined on that?

Q. I mean to say, this protest covers the same dates of stormy weather that he has been examined on by his counsel?

A. Yes.

Q. And you put into this protest every day of bad weather that you thought worth while to put in to save you from damages, didn't you?

A. Yes, that is more or less.

Q. And those days are the 18th of February, the 20th of February—those dates in your protest are the 18th of February, the 20th of February, the 18th of April, the 29th of April, the 1st of May, the 2nd of May, the 3rd of May, the 4th of May, the 5th of May, the 6th of May, the 7th of May, 8th of May, 9th of May, 10th of May, 12th of May, 14th of May, 20th of May—14th of May, 20th of May—29th of May, 30th of May, 31st of May, 1st of June, 5th of June, 9th of June, 10th of June, 11th of June, 1st of July, 20th of August and 23rd of August—is that right? Those are all the dates?

A. Yes.

Q. Now then, did you talk with Mr. Tucker with an interpreter?

A. Yes, with Mr. Matthes; he was present.

Q. And did Mr. Matthes interpret between you?

A. Yes.

Q. And it was in Mr. Matthes' presence that Mr. Tucker said that he would make no claim?

A. Yes.

Q. And it was after he had seen your protest?

A. I don't know whether he had already seen the protest, or was it on account of what he had seen of the damages on board the vessel. I know that he saw the protest.

Q. Your crew was taken out of your ship by the French Consul, wasn't it, just before you were ready for sailing? Wasn't it?

A. I don't understand what you mean.

Q. Wasn't your crew taken out of your ship by the French Consul, and transferred to another ship while you were in port here?

A. No, no.

Q. Did you go out with the same crew that you brought into Portland?

A. I went back with the same crew, with the exception of three that I left in Hobart and a few others that deserted here.

Q. Didn't you have some delay at the last moment, about your crew, about getting off?

A. Yes, some delay.

Q. When did you tell your counsel, Mr. McCamant, about this conversation with Mr. Tucker?

A. When my first depositions were taken.

Q. I want to modify a question, and ask it in another form. Didn't the French Consul take some members of your crew that had been prepared for you, and order them into another French ship?

A. I had three men engaged about—I had several, men engaged to join my vessel on Saturday, but inasmuch as the vessel was delayed through this libel, the men were put on another vessel.

Q. Wouldn't the men have been taken out of your vessel for the other French vessel, libel or no libel?

A. No, we would have left immediately.

Redirect Examination.

Q. Who did you transact your business with in this port, as the representative of the charterers? Who was Meyer, Wilson & Company's representative with whom you transacted your business in Portland?

Mr. WOOD: Mr. Tucker was the agent. We will admit that.

Mr. McCAMANT: For all purposes?

Mr. WOOD: No, I don't think that this amounts to anything; suppose Mr. Tucker said "I will waive their claims, and there will be no suit brought," it would be beyond his power.

Mr. McCAMANT: You don't admit he was the general agent.

Mr. WOOD: I don't know. I don't believe that is so.

Mr. McCAMANT: Well, I would like to have this question answered then, your Honor.

COURT: Let him answer.

A. Mr. Tucker.

Q. Mr. Alfred Tucker, who testified here yesterday?

A. Yes, Mr. Alfred Tucker.

(Witness excused.)

Whereupon proceedings herein were adjourned until Monday, April 8, 1912, 10 A. M.

Portland, Oregon, Monday, April 8, 1912, 10 A. M.

Mr. McCAMANT: Captain Lebeaupin wishes to make some corrections in his testimony which he regards as important.

CAPTAIN JOSEPH LEBEAUPIN. Recalled.

Direct Examination.

(Questions by Mr. McCAMANT):

Q. In your testimony Saturday, you said that in coming from Hobart to Portland you went to the north of Tasmania instead of to the south of Tasmania. Do you desire to correct your testimony in that respect?

A. I meant to say north of New Zealand, because I left from Hobart—that is north of Tasmania.

Q. You testified in your direct, and also in your cross examination on the subject of your experience. State when you first went to sea?

A. 1895.

Q. In what sort of vessels did you navigate between 1895 and 1899?

A. During those years I sailed in either large fishing vessels, or coasting vessels, on the French coast. Only since 1909 I have been sailing on large sailing vessels.

Q. 1909 or 1899?

A. 1909.

Q. Since 1909? Does he misunderstand?

A. 1899. I was sixteen years old at that time.

Q. Since 1899 what character of vessels have you sailed in and in what part of the world have you navigated?

A. Since 1899 I have sailed in large sailing vessels on Horn voyages; only two voyages I go to Martinique.

(Witness excused.)

J. W. MATTHES. A witness called on behalf of

the claimant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. McCAMANT):

Q. Mr. Matthes, where do you reside?

A. Portland.

Q. What relation do you sustain to the fleet of French sailing vessels which visit this port from year to year?

A. I am the agent for the British shipowners' Liability & Indemnity Association of London, of which the majority of French shipowners are members.

Q. Have you, from time to time, been called upon to transact business on behalf of these ships with Meyer' Wilson & Company?

A. Yes, **several times.**

Q. Who represents Meyer, Wilson & Company in this port for every purpose?

Mr. WOOD: There isn't any question about that. I have since talked with Mr. Tucker. He says he is the general agent here with full powers.

Mr. McCAMANT: That is all right as far as that is concerned.

Q. Mr. Matthes, did you have any conversation with Mr. Alfred Tucker in August or September, 1909, with reference to the responsibility for damage to the cargo of the Babin Chevaye after the voyage which terminated about that time?

A. Yes, sir, I did.

Q. State what Mr. Tucker had to say on that subject.

Mr. WOOD: Objected to as irrelevant and immaterial, because under the admiralty law, as well as elsewhere, anything Mr. Tucker may have said in their conversation, without some consideration and agreement, would be immaterial.

COURT: Let him answer the question, for whatever it may be worth.

A. After the vessel had been in port some time, the cargo was gradually being discharged; it appeared that there was considerable damage, and I believe that when about 800 or more barrels had come out, that proved to be damaged, nevertheless Mr. Tucker intimated that he didn't expect to make claim because, from his investigation on board the vessel, and what was mentioned in the log book, or in the extended protest, to his belief it was simply a case of perils of the sea, where the receivers of the cargo have no claim on the vessel. But some days afterwards, he told me that the Northwest Steel Company had made a claim, quite a large one, on damaged steel and iron, and Mr. Tucker told me that he didn't expect to make a claim on the cement, and he would tell Mr. Beebe that there was no possibility of his making any claim on the vessel. He had no right to.

Q. For what reason?

A. On account of the perils of the sea for which the ship is not responsible. Well, the result was that Beebe & Company considerably reduced the claim, but still insisted on a certain amount, and Mr. Tucker told me that they would press their claim, and wanted me to libel the vessel, because it will be otherwise out of my pocket. They will make the claim to me, and if I

cannot recover from the vessel, it will be out of my pocket, or out of the pocket of the firm, and so if they insist upon making a claim, then I am going to include all the damage to the cement likewise.

(Witness excused.)

Mr. McCAMANT: I offer in evidence the Rehl deposition.

Rehl deposition read in evidence.

During the reading of this deposition, at the request of Mr. McCamant, plat, offered with the deposition and identified therein as "Claimant's Exhibit A", Geo. A. Brodie, Notary Public" was marked for the purposes of this trial as "Claimant's Exhibit 7."

Mr. WOOD: We want the same objections as made in the deposition.

CAPTAIN ALBERT CROWE. A witness called on behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. McCAMANT):

Q. Captain Crowe, where do you reside?

A. Portland.

Q. How long have you lived in Portland?

A. Nearly 11 years now.

Q. What is your occupation.

A. Marine surveyor.

Q. Have you been in that occupation during these 11 years that you have lived in Portland?

A. No, 9½.

Q. 9½ years?

A. About 9½ years.

Q. You have been marine surveyor of this port for that period of time?

A. Yes, sir.

Q. What duties have you performed as marine surveyor?

A. Oh, superintend the loading, inspect damaged cargoes, condition the ships generally, whether they are fit to carry cargo and report on them if they are damaged—if they happen to have damage

Q. As regards superintending, loading cargo, do you have a plan for the distribution of cargo in making stowage in sailing ships?

A. Yes.

Q. That is one of the duties of your—

A. Well, not very much in reference to general cargo. My duties are principally with the lumber vessels, although I have some other vessels that take small portions of general cargo.

Q. What experience have you had, if at all, as a seafaring man, Captain?

A. About 26 years of it.

Q. In what capacity?

A. I was 17 years master, carrying cargoes of all kinds to all parts of the world.

Q. In sailing vessels or steamships?

A. Sailing vessels.

Q. Sailing vessels. Are you familiar with the principles which govern the distribution of cargoes of sailing vessels, as between the lower hold and between decks?

A. Yes, sir.

Q. State whether or not any definite and iron-

clad rule, applicable to all vessels, can be stated?

A. Couldn't be, because it depends entirely on the proportions of the ship. One ship may be big beam and small depth, another one may be small beam and large depth. It entirely depends on the model of the ship.

Q. Are you familiar with the Babin Chevaye?

A. Fairly well.

Q. How does the Babin Chevaye compare in the weight of her superstructure with the ordinary run of French sailing vessels?

A. It is very close to British vessels, if I remember correctly. Some sailing vessels—French vessels have long superstructure, long forecastle head, and long poop. If I remember correctly, the Babin Chevaye has a shorter after superstructure, and the hatch—the after hatch out on the main deck. She is nearly similar to English vessels, to the best of my recollection.

Q. What would you say Captain, was the proper distribution of the cargo, as between the lower hold and between decks, for the Babin Chevaye?

A. Approximately one-third of the cargo—of the weight, would be in between decks,—loaded in between decks.

Q. Suppose there were a departure of as much as fifty or seventy-five tons from that rule, what effect would it have?

A. Practically nothing.

Q. Who knows best as to the stowage of a vessel, Captain? Who is the man in the best position to determine whether the cargo has been properly distrib-

uted?

A. The man that has had experience with the same vessel; that has loaded various cargoes. You may take a heavy cargo, very heavy cargo at one time, and put in in the vessel, and even with the same weights, taking one-third between decks, have to elevate that weight between decks, and elevate it in the hold, by stowing in lighter cargoes underneath, you can change the stability of the ship greatly, with the same quantity of cargo—same quantity or amount in the lower hold, and same quantity in between decks; and it is the master, as those things go in—if he has had previous experience with the ship—he is the man that should know better than anybody else. As a master of a vessel, I have a general idea that will cover any vessel, but the master of the vessel is the man who should know that; if he has had the opportunity, he should know exactly better than any one else.

(Witness excused.)

Mr. McCAMANT: I now offer in evidence the deposition of the witness F. M. Grenapin.

Grenapin deposition read in evidence.

Mr. McCAMANT: Captain McIntosh is one of our witnesses, but he is not here. If you will permit me to reopen our case when he comes, that is our case.

Claimant Rests.

Mr. WOOD: I would like to recall Captain Lebeaupin for a few questions.

CAPTAIN JOSEPH LEBEAUPIN. Recalled by libellant.

Direct Examination.

(Questions by Mr. WOOD):

Q. Captain, where are the men's quarters on the Babin Chevaye?

A. Forward—behind the mizzen mast.

Q. Behind the mizzen mast?

A. Yes.

Q. The main mast is center?

A. Between—behind the first mast forward.

Q. That is the fore mast, isn't it?

Interpreter: Yes, the fore mast.

A. I don't know in English.

Q. Where is the galley, Captain?

A. Right adjoining, a little behind.

Q. And how do you get from the men's quarters to the poop deck?

A. Over by crossing a bridge from the forecastle where the men live, to the poop deck.

Q. Running lengthwise of the ship?

A. From the starboard side of the ship; with the ship on the starboard side.

Q. And is that bridge a permanent structure of the ship?

A. Yes.

Q. Built of what—made of what?

A. Built of lumber, reinforced with iron.

Q. And how attached to the ship itself?

A. It is attached to the deck with big pieces—large pieces of iron, and about every six or seven feet there are supports to hold it up.

Q. And on the same level above the deck as the

poop deck and the forecastle head?

A. Yes, exactly on the same level.

(Witness excused.)

ALFRED TUCKER. Recalled on behalf of the libellant in rebuttal.

Direct Examination.

(Questions by Mr. WOOD):

Q. Mr. Tucker, will you state the conversation that has been alluded to here by Captain Lebeaupin and Mr. Matthes, with reference to the damage to this cargo and the claim?

A. I probably had several conversations with the captain and Mr. Matthes regarding any claim they might possibly have, as is generally the case with all ships coming in with damaged cargo. It is my duty to find out the cause of the damage, if possible; to trace it up, and find out whether or not the ship is responsible, or whether it has been caused by perils of the sea, or whatever the cause may be. And I recall several conversations to the effect that it was not our wish to claim upon the ship. We would rather avoid it if we possibly could. It was no credit, either to the vessel or to ourselves, to prefer a claim, or later to enforce it, but if we made a claim, we should certainly do our best to enforce it, but we would have to be satisfied first in our own minds, that the ship was responsible for the damage. I am quoted as having referred to the log book. As far as I can recollect, I never saw the log book of the vessel until after the cargo had all been discharged, and the protest had been extended. I had no opportunity

of examining it, and even if I had, I recall having—when I did see the log book—finding considerable difficulty in translating it. I am not thoroughly conversant with the French language. I can understand a little of it when it is spoken, but I find it very difficult to read and translate the language as written by hand, and therefore I certainly could never have made the statement, and certainly never did make such a statement that from the account in the log book, which I had seen, I was convinced that the ship was not responsible for the damage. As I said it is my duty to inquire all around, and find out how the damage happened, what was the cause of it. And, in this instance, I made numerous and sundry inquiries of different people and came to the conclusion in the end that the ship was responsible for the damage, although earlier I may have, in taking the captain's word, or Mr. Matthes' translations of conversations with the captain, inferred that the damage might have been caused by perils of the sea. But I certainly never told him at any time that we would not prefer a claim against the ship. I would have qualified that by stating unless I was convinced that the ship was responsible, in which case we should certainly prefer the claim.

Q. I forget whether I asked you, or whether you know, in this damage to the cement and steel, was it confined to any particular part of the ship, or was it general throughout her length.

A. The damage to the steel was more or less throughout the whole vessel, though all of it was not bad salt water damage. Some of it was apparently

fresh water damage, which is not serious, and not objected to, but the salt water damage was pretty well all through the vessel. But now, I was not in the hold of the vessel, or in between decks to see every piece of steel handled, so I cannot, of my own knowledge, swear as to the particular position which each piece may have occupied in the vessel.

Q. How about the cement?

A. As far as the cement was concerned, that was from the after end, as I recall it now. There was also other cargo damaged in the vessel.

Cross Examination.

(Questions by Mr. McCAMANT):

Q. Mr. Tucker, did you read the protest which I now hand you, at or about the time when the vessel finished discharging?

A. Yes, sir.

Q. And wasn't your conversation with Captain Lebeaupin and with Mr. Matthes subsequent to the time when you read the protest?

A. As I said just now, I had a great many conversations with the captain, and I do not recall Mr. Matthes coming into the case until the vessel was pretty well discharged, but I may be at fault in that. I won't insist. However, my general conversation with Mr. Matthes was after the protest was extended and translated.

Q. Did you tell him, after you had read the protest which I handed you a moment ago, that, in your opinion, the damage to the cargo was caused by perils of the sea?

A. I have no recollection of making such a statement, Mr. McCamant.

Mr. McCAMANT: I offer in evidence the protest, your Honor, for the purpose of connecting up the testimony of this witness.

COURT: The same one that has been used?

Mr. McCAMANT: Used without having been offered in evidence.

Mr. WOOD: It hasn't been offered. I don't think it has been used in the case.

Mr. McCAMANT: I think the captain's attention was directed to it.

COURT: Let it go in.

Marked "Claimant's Exhibit 8."

(Witness excused.)

J. J. JORDAN. A witness called on behalf of the libellant in rebuttal being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WOOD):

Q. Where do you live, Mr. Jordan?

A. Portland.

Q. And how long have you lived here?

A. 40 years.

Q. What is your business?

A. Shipwright and caulker.

Q. How long have you been following the business of shipwright and caulker?

A. What you say?

Q. How long have you been following that business?

A. All that time, pretty much.

Q. About how many years in the Port of Portland?

A. Ever since I came here—40 years.

Q. Did you recalk the main deck of the Babin Chevaye some time in September, 1909?

A. Yes, sir.

Q. Who had the contract for doing it?

A. I was foreman for Captain Crowe, the firm of Crowe & Anderson.

Q. And you acted as foreman for the job?

A. Yes, sir.

Q. How much of the deck did you recaulk?

A. The whole main deck—all of it.

Q. How much of the old caulking did you take out?

A. Well, one-third, sometimes two—where it was real bad we took out a good deal more.

Q. What condition did you find the caulking that you took out as to age and softness, and so on?

A. Well, pretty poor condition.

Q. Well, explain a little more definitely what you mean by poor condition, as to its softness or rot?

A. Well, the oakum was decayed—had lost its covering for its protection—I suppose by the ship-maker. The pitch is a protection for the oakum. Oakum won't stop a leak itself—has got to be protected by another coating, kind of pitch or something else.

Q. Had the oakum lost its thread-like character and continuity so that it was putty like?

A. Yes, sir. Yes, sir, it was decayed.

Cross Examination.

(Questions by Mr. McCAMANT):

Q. How much of the old caulking did you say you removed, Mr. Jordan.

A. Well, we rived the whole deck.

Q. What?

A. Rived—that is commonly, the caulker's force rive it; took out one thread or two where it was necessary, out of the whole deck, from the combings of the face of the cabin, to the combings of the forecastle head.

Q. And you re-caulked the whole vessel—the whole main deck of the vessel?

A. Yes, sir, the whole main deck.

Q. You say you took out one thread or more?

A. Yes, sir.

Q. What do you mean by that?

A. Well, there is five or six threads in a ship of her age.

Q. And you left the other threads in?

A. Yes, sir.

Q. You only took out one or more?

A. One or more.

Q. How many did you take out?

A. I cannot tell; where it was required we took out a little more.

Q. Now, when you got through, the ship was in good shape, as far as her main deck was concerned, was it?

A. Yes, sir.

Q. And it wasn't necessary to take out these oth-

er thread?

A. Oh no, we don't usually do it unless it is bad all the way through.

Q. And that was not the case with this vessel?

A. No, it wasn't bad all the way.

Q. Simply all the top threads that would be in bad shape?

A. Yes, sir; yes, sir.

Q. Now, Mr. Jordan, couldn't that be caused by the heat in passing through the Torrid Zone—the condition in which you found that pitch?

A. No, sir.

Q. You think not?

A. No.

Redirect Examination.

Q. Mr. Jordan, the oakum that was left in the deck—what did you do to that, if anything? Did you set it down, or treat it in any way?

A. Horsed it down with what we call horse iron.

Q. When you quit, she had a good, water tight, seaworthy deck?

A. She had, sir.

Recross Examination.

Q. How many days did you work on her, Mr. Jordan?

A. About 11,000 running feet in caulking. I called the other day at Captain Crowe's office. He mislaid the book. I gave him the book, so he would count—charge the ship for men and material furnished. He can't find the book. About 11,000 feet; about

fourteen men there, somewhere about seven days.

Q. Fourteen men working seven days?

A. Yes, sir.

(Witness excused.)

HENRY GRIFFIN. A witness called by the libellants in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WOOD):

Q. Mr. Griffin, what is your business?

A. Foreman Columbia Dock.

Q. And how long have you lived in Portland?

A. 22 years.

Q. Did you re-condition the hydraulic cement that came out of the Babin Chevaye, a French barque, in September, 1909?

A. Yes, sir.

Q. Just state what you did in that respect, and how many barrels were re-conditioned, and what you mean by re-condition?

A. Well, by re-condition, we open the barrel, and empty the cement out, and run it over a screen to get the lumps out of it. I should judge, about between 800 and 900 barrels. And there was—well, the damage run all the way from 15 or 20 pounds in some barrels, up to 350 pounds in others. Some was almost worthless.

Q. And about how long a time did it take, and how many men?

A. Well, I couldn't say how many days we worked on that. We worked on that odd days; use the gang

the day when no cars or anything to load, so we would re-condition cement.

Mr. McCAMANT: I think we object to this character of testimony, and move to strike it out on the ground it is not rebuttal. This is a part of their case in chief, as I understand.

Mr. WOOD: It is. And I didn't really intend to call this witness, but as Mr. Tucker had him here, I thought we would put him on for what it was worth. I will ask leave to put in or leave it out—I don't care.

COURT: You can put it in by special permission of the court.

Q. How about the facility for getting expert labor at that time to do this job? Were you able to get it?

A. For the re-conditioning?

Q. Yes?

A. Yes, sir.

Q. Were you able to get it at all times?

A. While we was re-conditioning it, yes, we had the regular gang on the dock there, that had always followed that kind of work.

Q. Well, if I may be allowed, I will direct his attention. Mr. Tucker thinks and says that you couldn't get, at all days or all times, the men to do the job, and that you worked at it at odd times when the men were available. What is the truth of that?

A. Well, we had—there was a gang on the dock there that re-conditioned the cement, and we kept a steady gang of men there.

Q. You worked at it steadily then?

A. Most of the time we worked at it, but some days would be all loading cars, or unloading cars;

something like that.

Q. And you didn't remember how many days you were at the actual cement work?

A. Couldn't say.

Cross Examination.

(Questions by Mr. McCAMANT):

Q. Were you at it two weeks?

A. Yes, we were at it more than two weeks.

Q. Were you at it three weeks?

A. Well, I don't know about the actual time. We worked at it for about six weeks, I believe, off and on.

Q. Six week off and on. Now, was it as much as a month's steady work, Mr. Griffin?

A. Well, I couldn't say as to that.

Q. Wasn't over a month's steady work, was it?

A. Well, I couldn't say just how many days it was. Would have to get the records from the docks down there to show that, I believe.

Q. Well, you know approximately, don't you?

A. Well, I wouldn't attempt to swear to whether a month, or more than a month.

Q. How many men were working on it?

A. Well, two men and four men—two men in a gang—two men at a screen.

Q. How many barrels of cement was re-conditioned? 800?

A. Yes, or 900.

Q. About how many barrels of cement will two men handle in a day?

A. Re-condition all the way from 25 up to 35—de-

pend on the condition of the cement.

Q. Part of the time you had two men, and part of the time four men, you say?

A. Yes, sir.

Q. How much of the time did you have four men?

A. Well, I couldn't say to that.

Q. Half the time?

A. I suppose about half the time.

Q. And you think they averaged 25 or 30 barrels a day? Each crew of two men?

A. Of two men, yes, sir.

(Witness excused.)

Adjourned until 2 P. M.

CAPTAIN ALBERT CROWE. Recalled by the libellant in rebuttal.

Direct Examination.

(Questions by Mr. WOOD):

Q. I believe you have already stated, Captain, your experience at sea covering how many years?

A. 26.

Q. And in sailing vessels?

A. 17 years as master of sailing vessels.

Q. Steel or wooden?

A. Both wood and steel.

Q. I will ask you to listen to this question, which will be a very long one. Try to carry the main points in your mind. Whether on a voyage from Antwerp to Portland, by way of Hobart and the Cape of Good Hope, a steel vessel, loaded with general cargo, but principally cement and structural iron, leaving Ant-

werp about the 16th of February, 1909, and about 95 or 97 days out to Hobart, and arriving at Astoria the latter part of August of the same year, whether in that voyage, at that season of the year you would consider this an unusual proportion of rough weather, and not to be anticipated or expected by a vessel on that voyage: The 18th of April the sea very rough; deck constantly flooded by high seas washing over it; April 29th, sea constantly breaking over the vessel; sea high two days in April, 18th and 29th: May the 1st, sea very rough, decks forward constantly swept by waves: May 2nd, sea hollow, wind suddenly freshens, deck constantly covered with waves: May 4th, squally, wind blowing a gale at intervals: May 5th, lower deck constantly filled with water, decks flooded, weather improves, squalls less frequent; at one P. M. a strong gale, heavy rolling; forward part constantly flooded; seas break over the vessel from one end to the other; steering with the waves to avoid accidents: May 6th, very severe squalls; sea very high; entire deck constantly flooded; break water of the main hatch is carried away. (I will explain that some spars and planks were rigged to hold down the the hatch cover. They were carried away.) At noon impossible to remain on deck; sea high; steering with the waves; lower deck constantly filled with water to the height of the bullwarks; ship answers her helm; at 3:25 in the afternoon the vessel struck from behind by two waves; the first one lifts her bow in the air, and while her stern is down, the second one, the crest mountain high, lands on top of her; the stanchion aft on the poop deck, bent or broken; the wheel

house smashed; the wheel damaged; the grating on the port side torn away; the door of the chart house smashed; two coxswains torn away from the wheel; the second boatswain—coxswain Gallen thrown head foremost against the rack on the poop deck, picked up with a fractured fore arm, and internally injured; Boatswain Collet swept from one side to the other of the poop deck, finally seized the banister of the poop ladder, received a broken leg; the carpenter thrown against everything in his way, and his jaw smashed; two seamen, Francois Jaouen and Venant Marie Le Fur, carried overboard: 7th of May, sea rough and still impossible to keep the course, but at noon it is possible to resume the course: May 8th, sea rough; heavy rolling; deck constantly flooded: May 9th, weather improves, but rolling and straining; hatch opened at 5 P. M.: May 10th, severe rolling; fears entertained for the safety of the masts—when did I give you that the hatch was opened?

A. May 9th.

Q. That is a mistake. Weather improves is all it says—rolling and straining; May 10th, hatch opened in the afternoon: May 12th, decks swept from stem to stern; high seas taking the ship sideways; straining and shaking her tremendously; lower deck constantly full of water; 9 P. M. storm increases, and canvas on life boats and the third tarpaulin of the main hatch carried away. The hatches had three coverings, and the third is the one on top: May 14th, decks remain flooded, and sea very rough, but an examination is made of the cargo—no, an examination is made of the cement of the stanchion;—from the

main hatch to the deck house are broken; one rivet gone; hold is inspected: May 20th, sea rough; weather generally bad; decks flooded; weather become better on this day: 29th of May—never mind the 29th of May—took on a pilot for Hobart. So that in May they had one, two, three, four, five, six, seven, eight, ten stormy days. On the 9th of June, after leaving Hobart, decks constantly flooded; severe rolling: On the 10th of June, sea rough; blowing a gale. That seems to be about the end of the bad weather—the 10th of June. Now, I will ask you whether, on that voyage as described, at that time of the year, that weather, as I have described, in severity and duration, was anything unusual or extraordinary, such as a ship carrying a cargo on that voyage ought not to have anticipated?

Mr. McCAMANT: I object on the ground it calls for a conclusion, and endeavors to place the witness in the position of the Court, and on the further ground that it is not a proper subject for expert testimony, and on the further ground that the testimony is irrelevant and immaterial in that the question gives only partial picture of the evidence as disclosed in Court, and does not accurately describe all of the conditions.

COURT: Let him answer subject to that objection.

A. The amount—the number of days, about fifteen I totaled up there, of bad weather; in the southern winter months, making that passage, may have considerably less, but not unusual to have that much or more—that number of days or more. It could be an-

anticipated; similar weather like that could be anticipated.

Q. Is it anything unusual in a passage of that kind, with only about two feet of free board, and say four feet of railing, to have the decks frequently flooded?

A. The ship would actually have more—that ship would have more free board than that. Excuse me for answering your question in that way. I think there is an error in the amount of free board that vessel must have.

Q. The captain gave it in French dimensions, but Mr. Matthes, I think you translated that as two feet of free board, didn't you?

Captain LEBEAUPIN: I said three feet or more.

A. That ship should have about four feet ten.

Q. Well, the captain made a guess at it—he didn't pretend to know. But he can state now, if he will what, in English measurement, would you guess the free board to be?

Captain LEBEAUPIN: I don't remember it exactly but it must have been at least almost three feet.

A. That is wrong.

Q. Well, let's say that it had as much as four feet free board. Is it anything unusual for vessels carrying cargo, and heavily laden, to have her decks constantly flooded at sea?

A. Yes, you don't usually find them constantly filled. A ship should be prepared, or is built for encountering all kinds of weather. Of course, it may be exceptionally bad at times, may strain and labor her, but it is not unusual for her to have the decks

at times—well, maybe for a minute or two—all level right across from one rail to the other, but not very often.

Q. I didn't mean constantly, during the whole day, but, as entered in the log, during the day's seas coming over her, and frequently filling the deck—flooding the deck. In other words, what I am trying to get at from you as an expert: Is it unusual for a loaded ship's deck to be flooded with sea water?

A. Oh no, not at all; not at all.

Q. Now, would you say that, if on this voyage she really only left her course for 48 hours on the 5th and 6th of May, and ran before the wind, and then again on the 12th of May, she headed as close to the wind as she could go, but didn't run before it, but still couldn't keep her full course, because she was obliged to head into the wind, with these three exceptions—that is the 5th and 6th of May and the 12th of May—she kept to her course, and at no time went under less sail than lower fore topsail, foresail, lower main topsail, and upper main topsail, would you say that indicated very unusual bad or dangerous voyage?

Mr. McCAMANT: Object to it on the same ground as previously stated.

COURT: Very well.

A. In my opinion, it is considerable sail to carry with excessively bad weather. It is quite a large amount. Some vessels will carry it, but it is a large amount of sail to carry with the wind as we are led to believe it is.

Cross Examination.

(Questions by Mr. McCAMANT):

Q. Captain Crowe, suppose that the ship, instead of having 15 days of bad weather, had six weeks of almost continuous bad weather, what would you say as to whether that was the usual amount of bad weather in going around the Cape of Good Hope, from Antwerp to Portland?

A. Well, that would be—

Mr. WOOD: Wait just a moment. I object to that, because I think the degree of weather should be stated. A vessel might have six weeks of very disagreeable weather—head winds, contrary winds, contradictory weather, but we are talking of weather which put her structure to a strain.

Mr. McCAMANT: I think counsel's question is open to much more serious objection than that.

COURT: Let him answer.

A. Six weeks would be an unusual amount—would be a very severe passage. You can get very near—bad weather over very near the entire route, and I have made that very same voyage with never taking in except light sails. I have gone clear to Hong Kong, only taking the royals—that is, the upper one.

Q. Do not captains differ very much in their judgment as to the amount of sail to be carried in a given condition of wind and sea?

A. Yes, some captains will carry more, and some vessels are capable of carrying more. Some vessels will not steer if you carry too hard a pressure of can-

was on them. The captain really has got to be the judge, more than anybody else of that condition.

Q. The sails tend to steady a certain class of vessel, do they not?

A. The wind in certain conditions. If the wind is out a little on the side, it will press her or will make a pressure so she will go to one angle and remain there, or reef at one angle and come back; then the wind will steady. But the wind can be very strong, lots of sails, and still do excessive rolling. If the wind is right aft, blowing her direction, then the sails don't steady her very much.

Q. The question of how many sails to carry is a question depending on a good many considerations, isn't it, Captain?

A. Yes, sir, depends a good deal on the ship and the captain's good judgment.

Q. Assuming that you get two men equally competent, whose judgment would you have the most respect for—the captain out at sea with the vessel, and cognizant of the conditions, or the witness sitting in the courtroom, and testifying in response to questions?

A. I think I must admit, the captain being a qualified man, if he has had opportunity—been in that vessel long enough to learn her, he is the man really to judge better than anybody else.

Q. Now, Captain Crowe, you say it is usual—it is not unusual for the decks of a vessel to be washed with water? Is it usual—ordinarily how long will the water remain on the deck of the vessel?

A. Oh, I have seen them where the seas are very

bad, sometimes it will be an hour, with the vessel carrying 300 or 400 tons on her deck, of water.

Q. For an hour, you say?

A. Sometimes probably for an hour.

Q. Suppose during pretty much the entire day on the 2nd of May the decks were covered with water, and suppose on the 5th of May the decks were flooded with water, pretty much the entire day, and the seas broke over the vessel from one side to the other, and the vessel is covered up to her bulwarks with water most of the day; and suppose on the 6th of May the decks are constantly flooded all day long, so that nothing but the poop deck—no portion of the vessel except the poop deck is above the water—what would you say as to whether that was a usual condition of affairs?

A. Would be very severe weather and sea both.

Q. Now, suppose the vessel has been thoroughly inspected before she left her port—her home port—and has been classified by a competent surveyor, as entitled to No. 1 classification in the Bureau Veritas—you know what the Bureau Veritas is, do you not?

A. Yes, sir.

Q. You are the local representative here, are you not?

A. No, sir, I represent San Francisco underwriters.

Q. Suppose the vessel has been inspected in that manner, and has been given the classification which I described, by competent surveyors, and suppose her poop deck and the wall of the poop deck aft and the door leading into the chart room, and the superstruc-

ture about the wheel house have all, been inspected and found to be staunch and strong, and a wave comes along, and smashes in the door leading into the chart room, and the wall of the chart room, and also breaks in the superstructure in the neighborhood of the wheel house, all of those structures having been duly inspected and passed by competent surveyors, what would that indicate as to whether the weather was unusual or not.

A. Indicate rough seas.

Q. Would it indicate seas that—

A. They were not usual. They were severe ones. They were high ones.

Q. Would indicate that they were seas such as ordinarily would not be encountered, would it not?

A. It is not usual, not very usual. It is only perhaps once—well, lots of voyages you will make, you will never get any water up to the poop at all; in fact, many ships may go for years, and not have any. I don't know in this ship, whether she was what we consider a dry ship, and very seaworthy vessel, or whether she was subject to taking water on there, but the fact that she does take water around there, would seem to me that the conditions were rather bad, or else the ship was perhaps not on fine lines, not a dry ship, what would be considered a dry ship—one of the two.

Q. You know that this ship has come to this port on other voyages, do you not, Captain?

A. I think I know of three voyages.

Q. And you know that except on this voyage, there has been no quarrel with the manner in which

her cargo has been delivered, do you not?

A. I do not know that.

Q. Now, if that fact had been established, what would that indicate as to whether the ship in her construction was staunch and strong?

A. I think there is no doubt that a vessel, before she gets a certificate from the Bureau Veritas, must be built according to certain regulations for her. While that is in effect, that is evidence the vessel must be in pretty good condition although there may be defects in various places that the certificate really would not bring out at that time. If there were a certificate given just immediately prior to her going to sea, that all those conditions were right, then I think we would have to assume she was right then. In fact, the insurance companies would take a risk like that, and will pay for any damage without any question.

Q. Now, suppose, as a matter of fact in this case, the evidence shows that the vessel had been in dry dock before she left Antwerp, and while she was in dry dock, she had been inspected both outside and in by competent surveyors, and had been given her certificate by a qualified officer of the French Navy, who was the inspector at Antwerp for the Bureau Veritas, and then the door of her store room had been smashed in, in the way I have indicated, and the wall of the store room, and also the superstructure about the wheel house had been broken in, what would you say that indicated as to the severity of the weather?

A. It would be severe weather, and that is evidence the vessel was in good condition, if she passed

that examination.

Q. How then would you account for the breaking in of these walls and doors to which I have directed your attention, under those circumstances?

A. Very bad sea. Severe weather and very bad seas.

Q. And would you say that that was such severe—such weather as the ship would ordinarily expect to meet on that voyage?

A. No, not hardly.

Q. Now, suppose, Captain, the main deck of the vessel had been flooded by the sea for as much as 48 hours continuously, and at the end of that time, the pumps still were clear, indicating that there was no water in the hold, what would you say that indicated as to the condition of the decks at the time when the flooding began?

A. I think we must assume that the deck was in good condition on account of the certificate and examination she has had. If the deck did not leak afterwards,—after having been subject to the strain of the sea jumping on it, didn't leak then, then I would say the deck was in very fine condition.

Q. I call your attention particularly to the conditions which obtain on the 12th and 14th days of May. At 11 A. M.—that is the 12th of May—at 11 A. M., the decks are swept from stem to stern, violent rolling, and straining of the ship; at 1 P. M., awful weather, high seas taking the ship side ways, straining and shaking her tremendously; the lower deck—that means the main deck—constantly full of water up to the railing; at 9 P. M. the storm increases in violence;

the canvas of the life boats, and the third tarpaulin of the main hatch are carried away; also the railing of the poop ladder, and the cover of the man hole of the pump well; the port side of the deck house is stove in at least two inches: May 14th, decks remain flooded; sea rough; as soon as it was possible to go on deck, the captain and the officer of the watch made a thorough examination; the cement of the stanchions from the main hatch to the small deck house was broken and the stanchions slightly twisted; one rivet completely gone, causing thereby a considerable leak; temporary repairs were made with a wooden plug; as soon as more water is found in the hold, the main pumps are worked constantly; at 6 P. M., pumps clear; as the water was moving constantly, it was impossible to work the pumps; an inspection of the hold revealed several leaks resulting from the severe straining of the ship. Now, suppose, Captain, it appeared from the evidence that the rail of the poop ladder had been carefully inspected at Antwerp, before the vessel started on her voyage, by a competent surveyor of the Bureau Veritas, and had been passed satisfactorily; and suppose the port side of the deck house which was stove in two inches, was reinforced by a plate of steel, in addition to the wooden material in it, what would you say as to that condition of wind and weather, as to whether it was usual?

A. In as far as the rail was concerned, that would indicate almost nothing, but the forcing in of the side of the deck house shows that there was a very heavy weight of water come against it.

Q. Was that such weather as would ordinarily be

encountered with that kind of a voyage?

A. Well it would be very severe—very severe weather.

Q. Now, Captain, suppose a vessel leaves Antwerp, bound for Portland, by the way of Hobart, with her main deck properly caulked, and suppose, by reason of such weather conditions as have been described in the questions submitted to you on direct and cross examination, the vessel strains and labors heavily, so much that her seams are opened more or less, and such that the major portion of her main deck is under water for periods of 48 hours at a time, on at least two different occasions, and under water at other times for more than a moment or two—for a considerable period—what effect does that have upon the top threads of the oakum in her caulks?

A. Oh, the top thread will deteriorate some, but it wouldn't deteriorate the oakum but very little, unless there was a motion, a bending motion of the hull; a bending like a bending up and down of the deck on its fore and aft line, or straining the other way, athwart the ship—unless there was strain enough to do that, it wouldn't affect the oakum.

Q. Suppose the vessel did strain in the way you describe—what effect would it have on the oakum?

Mr. WOOD: Objected to. No such evidence there. It is a steel vessel.

A. It will partially chew the oakum on the top. It will crack the pitch, throw it out in places, and it will deteriorate the condition of the oakum itself. In places it will get quite soft. Did I understand right that there were some of the bulwark stanchions, that

the rivets were started? The braces in the bulwark stanchions, that they were started?

Q. There were several stanchions where the—

A. Bulwark stanchions? Braces to them?

Q. —where the cement supporting the stanchions were loosened or broken more or less.

A. That would indicate that the force of water there was a big strain coming on the bulwark, and it would come above—that breaking of the cement would come about, more on account of the water coming directly across the deck than it would from strain, or it can come from other cause. These rivets could be loosened, and the cement broken by a length-wise bending of the hull, or it could come by water jumping in one side and going over and hitting the bulwarks on the inside, putting a big strain on it. That injury can come about two ways.

Redirect Examination.

Q. Captain, did you ever know a vessel's deck to be constantly under water for 48 hours, without the rails showing at all?

A. No.

Q. Did you ever hear of such a thing?

A. Well, I have heard people make assertions in lines something similar to that, but I don't think it was ever really meant that the vessel would be in 48 hours,—the decks across the rail.

Q. When the entry in the log is, "decks constantly flooded"—it means from time to time, doesn't it? It doesn't mean all the time?

A. Well, the literal reading of it is full all the

time, but I have never seen one full for—oh, I have never seen the decks full for one hour—chock full.

Q. I mean to say, if you find the entry in the log "decks constantly flooded," what do mariners understand by that word "constantly"? Do they understand at intervals from time to time?

A. Yes, sir.

Mr. McCAMANT: I object to that. That is not a proper subject of expert testimony. The question is incompetent.

Mr. WOOD: It is an expert term.

COURT: If there is an expert term, or a term commonly used, it is competent, I suppose—that is, his translation.

Mr. WOOD: Commonly used in all English logs "decks constantly flooded." Technical term, you might say.

A. I wouldn't understand the deck full up to the rail all the time. It is more an expression of the condition—there was a lot of water on the deck.

Q. Now, Captain, in steel vessels, stiff and staunch, and seaworthy in every respect in her hull, and tight and staunch and well caulked in her decks when she left Antwerp, is there anything in her being constantly flooded with water that would let the water through the seams of the deck into the hull?

A. Not without working. The ship must work, or the deck would not leak. She could be under water there for a fortnight; if there had been no strain in the hull itself, the deck wouldn't let the water through.

Q. Where is the worst strain of this kind—if the

ship was buckling in any way, where would this be most apt to show? In the deck seems?

A. Will usually show the most around the main hatch, where an opening is cut in the deck, if not properly reinforced around there. In any vessel, even with all compensation for cutting away the beams, it will usually show around the hatches and the middle portion of the ship first.

Q. Now, if a vessel is as I described that, tightly caulked—well caulked, seaworthy deck, main deck of a steel ship, and she is pooped by one big heavy wave, that fills her from stem to stern, is that any justification for this deck's leaking?

A. Yes, I would say so.

Q. Why?

A. Because in going over the top of the house, we would probably have about seven feet, and this big volume of water goes on top of the poop as it jumped down the main deck, and will shake things enormously.

Q. And would that—

A. That would start the deck.

Q. Would that one act be sufficient to open all the seams of the deck?

A. Not along the whole length.

Q. Now, in your experience as a mariner, don't the spread of canvas that is carried, always have some indication as to the strength of the wind, and the severity of the storm?

A. Yes, sir.

Q. Did you ever know vessels to go under bare poles?

A. Yes, in rare times.

Q. How much canvas, for example, is carried in a hurricane?

A. None at all.

Recross Examination.

Q. Captain, are you familiar with the methods by which French vessels measure the severity of the winds? These figures one to twelve.

A. I think that is in **general use**.

Q. That is in general use?

A. Yes.

Q. Now, is it usual for the wind to attain a velocity of eleven, mentioned in that protest, measured by that standard, on a voyage from Antwerp to Portland?

A. That is very severe weather.

Q. Very severe weather?

A. Yes, sir, very forceful weather.

Q. Isn't nine as high as ordinarily the wind would range on that voyage?

A. Oh no, ten is quite frequent, but eleven is seldom.

Q. Eleven is seldom, you say?

A. Very seldom.

Redirect Examination.

Q. Have you been on the barque Babin Chevaye?

A. Yes, sir.

Q. And if you were the judge of the severity of the weather, and rated it eleven, would you on that vessel carry the lower fore topsail, the foresail, the low-

er main topsail, and the upper main topsail?

A. I doubt very much if the sails would stand, or the gear. It would be an enormous pressure of canvas for a force of eleven of wind.

Recross Examination.

Q. Depends somewhat on condition of the sea, wouldn't it, Captain?

A. Oh, the amount of sail, yes. If you are running with the sea, or running with the wind, you are lessening the effect on the ship and on the sails, and you can stand a greater force of wind in going with the wind—in that direction.

Redirect Examination.

Q. It still remains, though, if you rated it eleven, you wouldn't carry that sail in eleven weather?

A. Well, I would doubt that very much. I don't say that I would, because I would have to be going—I think the gear on my ship, and I usually keep a very good one, it would have to be the same as new, and going with the wind, I think, to stand such a force as that.

(Witness excused.)

CAPTAIN ANDREW HOBEN. A witness called on behalf of the libellant in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WOOD):

Q. Captain, you live in Portland, I believe?

A. Yes, sir.

Q. How long have you lived here?

A. 21 years and about eight months.

Q. Did you ever go to sea?

A. Yes, sir.

Q. For how long a time?

A. Oh, I was at sea about 30 years—about 20 as master—a little over 20.

Q. In what character of vessels?

A. Been in all classes.

Q. Deep sea ships?

A. Deep sea ships.

Q. This 20 years' service as master in deep sea vessels?

A. All the time.

Q. Been in wood and steel ships?

A. Wood, steel and iron.

Q. What is your occupation now?

A. Marine surveyor for San Francisco underwriters is my principal business. I have other surveys, but San Francisco underwriters—what we call Wheat Cargo Association, London and San Francisco. I have been in that since I have been here.

Q. Were you acting in that capacity in September, 1909?

A. Yes, sir.

Q. Did you survey the French barque Babin Chevaye, that month and year, for a wheat cargo at Portland?

A. Yes.

Q. What condition did you find her decks in—her main deck?

A. I made a survey when the ship arrived here, of the ship in general for damage, and her decks. That

would be about the 13th—I think the 13th of August.

Q. What condition did you find?

A. Didn't find them good enough to satisfy me that she was in condition to carry a wheat cargo, and on that cause I wouldn't grant a certificate until her decks were caulked.

Q. Did you order the caulking?

A. I recommended it.

Q. Who performed the job?

A. Anderson & Crowe, I believe. Yes, it was Anderson & Crowe.

Q. And what was the matter with the main deck?

A. Well, the deck was soft in general, and on the passage out it was patched up considerably in places; on the voyage from Antwerp to this port. I couldn't say when it was done. There were many places that they had touched up. I suppose they leaked. And I also went down into the hold, and found many many barrels of cement all over the ship, which was more or less damaged from leaks in her deck.

Q. How were those leaks in regard to being general, running fore and aft and athwart ships?

A. Oh, the leaks was principally all over the deck, and a great deal of water coming down from the bulwark stays, which was—the cement was cracked around the heel of them, and some rivets was loose at the time. I think some of them had been replaced, but still there WAS some of them loose around the bulwarks, in the heel of the bulwark stays, but the cement was away, plenty on each side.

Q. Were you familiar with the stowage of her cargo on that voyage inward?

A. Of course I seen it, but I didn't take much interest in it. I was over the ship occasionally, while she was discharging—while the work was going on, of calking the deck, because I examined the ship in the lower hold after the cargo was discharged, to see if any of the beams was broken, and I found two beams on the port side abaft of the main mast, at the inside end of the gusset was fractured. So of course I had to look for some more, to see if there was any.

Q. When were those fractures made, do you know?

A. Oh, I suppose on the passage.

Q. You don't know?

A. Well, I think for sure they was made on the passage, because the fractures was fresh. I wouldn't swear it was, but it is my belief that it was on that voyage these fractures come through. Still I might be wrong.

Q. Now, the patches that you found in the deck. How did they compare with the old calking—the old seams, as to quality?

A. Oh, I didn't try them patches, not hardly any. I only tried the part of the deck that hadn't been calked. If I went over them might have found them better. I was looking for bad places, not for good places.

Q. Then you ordered complete new recalking?

A. I think my report is here, aint it, Mr McCamant? My report of the survey? I made a report of the calking. I made you from memory a good deal. Of course I read it over in my book at home, but I think the report is here.

Mr. McCAMANT: I think so. Want to see it?

Mr. WOOD: Yes, I would like to have a look at it.

Mr. McCAMANT: While Mr. Wood is looking at that, may I have permission to open up my case to offer in evidence this stipulation admitting my client is a corporation. I have no evidence on that point.

COURT: Yes.

Stipulation marked "Claimant's Exhibit 9."

Q. There it is, if you want to look at it (the report).

A. I think I remember. I think I can give it from memory.

Q. Do you remember, Captain, how the cement was damaged in reference to the distribution of damage over the extent of the cargo?

A. No.

Q. Have you any information from your observation of the cargo and the ship, as to whether or not she was properly stowed and loaded?

Mr. McCAMANT: I object to that. His information would not be evidence, your Honor.

Mr. WOOD: Well, I was going to ask what he knew.

A. As far as I seen, the cargo in my opinion, was properly stowed but I wouldn't consider from my knowledge of the ship in general, and the appearance of the ship, and the working of the ship, and what I have seen of the ship that the cargo was properly distributed. Now, that is, I mean, a big portion of the iron was down below—down in the hold, low down, then a portion of it between decks, and then cement on top of that again.

There was a big space, or a space—I wouldn't say—about two feet—in between decks, and the same in the lower hold. Well, having that iron so much down below, and low in between decks, in my opinion would fetch the heft of the cargo very low in the ship.

Q. What would be the effect of that?

A. Would make her very stiff and laborious at sea. I am not saying that is correct, but that is my opinion.

Mr. WOOD: To save putting that long question in the record, is there any objection to his examining this protest, and I will examine him on it?

Mr. McCAMANT: No.

Q. I will ask you to read over the captain's protest on the Babin Chevaye. Then I am going to ask you, after you have read it, your opinion as a mariner, as to the severity of that weather as to its being extraordinary, and unusual, both in quantity, duration of time, and extent of severity. Will you read over the protest, please, Captain?

COUT: Is this diagram supposed to represent the cargo—the stowage (Referring to Exhibit 7.)

Mr. McCAMANT: Yes, Your Honor.

COURT: These dark lines here?

Mr. McCAMANT: I don't know. That is what the first mate introduced. He said it was rough. I don't know how accurate it would be in that regard. The captain was examined particularly as to space, and so was the mate, but I don't think anybody has testified that the diagram was accurate in that respect.

Q. Have you read that over, Captain?

A. Yes.

Q. Now, Captain, that being the record of a steel ship, on her voyage from Antwerp to Portland, and particularly showing the voyage to Hobart, by way of the Cape of Good Hope, and I will add to that, she was only three days driven from her course; that is, on the 5th and 6th of May she ran before the wind, and on the 12th of May she headed close into the wind, and that the lowest sail which she carried in the worst weather—the lowest sail she carried was the lower fore topsail, the foresail, the lower main topsail, and the upper main topsail—wait a moment before you go on—I want to ask the Captain a question.

Mr. WOOD: (To Captain Lebeaupin) There seems to be a discrepancy in your testimony here. You said that that was the sail you carried, and then on the 6th of May you said you carried the same sails as on the 5th, and then I asked you to repeat them, and you repeated the foresail, the lower fore topsail, the mizzen middle staysail, and the mizzen top mast foresail, which are not the same as previously given. You may want to correct that, or it may be your translation, Mr. Matthes.

Interpreter MATTHES: No, I noticed myself when he said so.

Mr. WOOD: I just wanted to give him a chance to correct it, because they are not the same.

Q. We will say that it is the minimum sail carried. I will ask you whether, either in duration of bad weather, or in the extent of it, it is such weather as on a voyage of that kind, at that time of the year, ought not to have

been expected, and was unusual and extraordinary.

A. Generally at that time of the year, we look for that weather. Sometimes we don't get it and sometimes we get it pretty bad. But I have made several passages down there, and I have had similar weather, and had my decks what you would call flooded—constantly flooded; that is, heavy seas wash over it; before they are quite run off, you know, another fellow would come—keep acoming like that. We look for that weather. On that passage after you passed the Cape, or after you pass Christocona, that is an island in about ten west and thirty-five south; we generally go down to 42 or 45 when we are running down for Australia or Tasmania, which is Hobart, but we always look generally for gales of wind, the same as we have on this coast in November.

Q. I will ask you, as you viewed the Babin Chevaye and judged her, could she have carried any such spread of sail as that in extraordinarily bad weather, such as a real tempest?

A. The ship could have carried the sail or any other ship. The ship was staunch and strong in every way, barring her decks. I leave them out. And she could carry any sail, practically—would stand the wind, but if it was blowing so hard as the captain explains it, I don't think the canvas would stand the pressure.

Q. Is there anything in the main deck being constantly under water, constantly flooded, which should excuse its leaking?

A. If the deck was properly caulked—that deck—if the water was on it for three weeks, it ought to keep

tight, provided there was nothing carried away. That is the intention of the deck when properly caulked. The same as the bottom of the ship, it is supposed to keep out water. It is not supposed to leak.

Q. You mean if nothing had been carried away, nothing of the deck had been carried away?

A. No part of the deck.

Q. To open the hold?

A. To open or make a hole. That is, if a sea came in and struck the hatch, slewed the hatch off, sort of raised the corners, it might leak and flood the ship; but never leak if water on it for a week—that is the intention of calking it. Must be tight. There is no excuse when a deck is caulked properly, it must be tight.

Cross Examination.

(Questions by Mr. McCAMANT):

Why does it become necessary to recaulk the vessel?

A. What?

Q. Why does it become necessary to recaulk the decks of vessels from time to time?

A. Well, a deck properly caulked is good for three or four years, except the butts. But a deck that is not properly caulked, or just run over, is good for about one year. But I have caulked decks, and when I caulk decks, or see them caulked in Portland, you don't find any claims coming back for damaged cargo. The caulkers in Portland caulk decks in any part of the world; that is, I mean the Union now, because they only caulk 80 feet in a day, and that they will do well. There was a time here—eight or ten years ago—when they caulked

200 or 300 feet; they had to have their bosses. They used to run over, and I told the underwriters that deck was only good for one voyage, because it wasn't well caulked. You know everything can be slighted, but if a thing is well done, that is going to carry.

Q. And a deck that is properly caulked ought to last three or four years.

A. Except the butts, of some certain places. That is I mean after the first caulking, when the ship is new the caulking on that deck is only good for one voyage, and hardly that, because the deck is green, and it will shrink up. But if that deck has been caulked once or twice, and you caulk it in fine weather like this—I don't say you can caulk a deck when it will be wet weather; that would be very bad caulking, but caulking a deck when dry weather like this, and have it caulked well, that deck I guarantee is good for four years, and will never leak, except around the hatch combings, or house, where the stanchions, or around the mast where the stays is bolted. The butts, as I say, from working, may get loose; that is, these French ships they don't work much; they strain a little because they are a steel deck on top of the beams, and a wood deck on top of that, and they are so tight that they can't work like an English built ship, with just a wood deck on top, and tie bolts, or stringer bolted for strengthening the ship. These French ships are steel deck underneath; of course, not tight, but they will let water in it; that is, to strengthen the ship.

Q. The wooden deck is the water tight deck of the ship?

A. A wooden deck is the water tight deck on a ship of that class. If they put a steel deck in without wood on it, they will make that deck tight by caulking it; will have no holes in it. But the deck is put on—where a wood deck, or what we call wood sheathing is put on, it is the wood that keeps it tight. If, every time they put a hole down to put a bolt in, that bolt don't fit—goes down loose—they would leak.

Q. Captain, you know that the Babin Chevaye has been to this port since this voyage, do you not?

A. Oh, I have had to do with her for awhile; I think had her four or five days.

Q. Her cargo has come here in excellent condition on every voyage except this one, has it not?

A. Well, I couldn't remember, but I think the last time that she came here, it was in such condition. At least I didn't have to caulk her decks, but that was about a year after I had the decks caulked.

Q. You found her in good condition the last time you saw her?

A. When she came back I couldn't see anything. I couldn't find her.

Q. Now, is it usual for seamen to be washed over-board on the voyage around Cape Good Hope, Captain?

A. Oh, that happens many times.

Q. You don't think that is an unusual circumstance, then?

A. No, it is not, sir. I have had two washed over myself. It aint every day's occurrence, but it do happen, I say.

Q. Is it a usual thing for three members of a crew to be disabled by—as the result of one wave hitting the vessel—one man having his arm broken, one having his leg broken, and the third having his jaw broken?

A. Well, it wouldn't take very rough weather to do that some times, although that might be—the sea might come in and hit these men. I have been knocked around the deck myself by a slap of the sea, and not very big wave either.

Q. You don't think that indicates anything?

A. You find things like that happen between here and San Francisco on the "Breakwater" or "Columbia"—not very long ago when a man on the Columbia, I think. All such things happen.

Q. You don't think that indicates anything unusual, then?

A. Well, I have seen, and I have heard so much about it. Of course, not every day's occurrence, but it does happen.

Q. Isn't it a fact, Captain, that you have had so much experience, and have seen and heard so much of the accidents of navigation, that there is very little that happens at sea that strikes you as unusual or unfamiliar?

A. Well, there may be something in that. I have seen a good deal. You know I have been a long time at sea.

Q. How old are you, Captain?

A. 72. I have been over 60 years at sea. I was master in '64—one year before the Rebellion was over, of course I have had a little experience; and caulking decks 21 years, going on 22, here in Portland. All these ships

come under me. I have good knowledge of a deck. I have only to look at it. I don't care to dig with a jack knife, for I consider that would be only to keep out hail stones. I try with a caulking iron—a proper caulking iron, and if a deck wants caulking, you got to have it caulked before I grant a certificate.

Q. You say that this vessel was staunch and strong in every respect except as to the deck when you saw her?

A. Barring what was carried away. I mean her spars and rigging and hull. There was some damage around her deck which I didn't go into. I can name the damage if necessary, but you aint on that, I suppose.

Q. Now, suppose the vessel was staunch and strong in all of her construction when she left Antwerp, and suppose a wave came along and broke in the door of the chart room and the wall of the chartroom, and the superstructure about the wheel house, what would that indicate with reference to the severity of the sea which did that?

A. It would indicate that it was pretty rough.

Q. Well, wouldn't it indicate that the weather was very unusual?

A. Not altogether. I was bearing sail once on the poop of my vessel. I went down below. While I was down below, there was a big sea came, and swept that sail away, and swept the skylight. If I had been there, I would have been off too. 45 years ago. Sometimes a wave will come. We have one or two cases here, when a vessel went into Honolulu—the wave was not very rough—a Norwegian steamboat. A big wave came, and a

funnel went off. These things will happen.

Q. In other words, that is not an unprecedented occurrence?

A. Well, it is not uncommon for ships to get smashed up at sea like that, and even put back from Cape Horn to Port Stanley, Montevideo or Rio for repairs,—see it every year.

Q. Good, staunch ships?

A. Good, staunch ships, as staunch as the *Babin Chevaye*. Every year you will see half a dozen of them.

Q. That is what you mean when you say this was not an unusual occurrence?

A. I don't think it was very unusual. Of course, it don't happen, as I say, every day, but it happens right along.

Q. What do you think that indicates with reference to the construction of the vessel, when an incident of that sort happens? Does it indicate anything?

A. No, sir it may happen to the very best of ships. I went on the *Authorian* (?) one spring here about 25 years ago, and the voyage before she shipped a sea—one of those big ocean liners from New York to Liverpool—and it carried away her forward bridge, and took two men overboard, broke stanchions bigger than my arm.

Q. What was her condition prior to the time the storm struck her?

A. She was one of the first-class ships; one of the Cunard line. I say those things will happen sometimes.

Q. Even the staunchest and best of ships?

A. Even to the very staunchest and best ships. It

is no fault, I don't consider, of the ship in any way, for this wave to come over. No fault of the ship, or navigation or anything—just perhaps unfortunate that sea tumbled up and came over.

Q. Now, Captain, how many rivets did you find loose in the Babin Chevaye when you inspected her here in Portland?

A. I think about 20 stanchions or stays; we will call them by the proper name—there were 20 stays on each side of the bulwarks.

Q. What is your theory as to how they became loose?

A. Well, my opinion is to the heavy straining of the ship, caused by the cargo being too low, and also the very bad weather. I wouldn't like to say that one was the exact cause, or the other, but I know it is between the two of them—one helped the other out.

Q. Now, how much of that cargo was in the lower hold? Do you know?

A. I don't know. I only took a general view of the way the cargo was stowed.

Q. How long were you down in the hold.

A. Oh, I was down four or five times. I couldn't tell. I examined all the beams in the lower hold, and in between decks, as they discharged it. Might be half an hour down, might be an hour. I seen the cargo several times, but I haven't much knowledge of the cargo, only from what I have seen.

Q. Was your attention directed particularly to the cargo, or to the vessel at the time you made the examination?

A. I wasn't particular about the cargo, only by my looking at the cargo, and knowing the condition of the cargo, it gives me an idea of what part of the ship had done the damage.

Q. Well, you were not employed to survey the cargo, were you?

A. No, sir, not to my knowledge.

Q. Now, how much iron was there in between decks on that cargo?

A. I couldn't say. I only give you a general view of what I seen; the way the cargo was stowed with the iron, the bulk of the iron being in the lower hold, and the balance in between decks, it made a great heft very low down.

Q. What is the general rule for the stowage of cargo, as to how much should be in between decks, and how much in the lower hold?

A. Now, we have to take into consideration what kind of cargo you are going to load. There is a whole lot in the cargo. If you load wheat, flour or coal, about one-third, but if you were to load pig iron, or railroad iron, and you only put one-third in between decks, why it would tear that ship in pieces before half the voyage, because the cargo would be so low down. It would occupy such a small space in the hold, that the whole of the cargo would be too low in the ship. You would want at least 40 per cent or more, of a cargo of that kind, in between decks, to make that ship an easy ship at sea.

Q. Suppose you had 600 tons of pig iron on board, how much ought to go in between decks?

A. Well, that wouldn't be no—if I knew exactly what their heft was. You might want all of that below.

Q. Do you know, Captain, how much pig iron was on this ship?

A. I don't know about the cargo, only when I viewed the way the cargo was stowed and the ship as she came before my eyes. I knew the ship had strained below, where these beams were broke, and at the end of the other beams in the hole. I knew the ship had worked considerably and strained, and I considered that due to the cargo being a little too low, and also the rough sea; that the two combined had strained the ship very much. I couldn't exactly tell you how much of the cargo was below, but that is my opinion. Now, I don't say positively, but from my own knowledge of the ship, that is my view of it.

COURT: In what part of the ship were the beams broken?

A. What?

COURT: In what part of the ship were the beams broken?

A. The main mast.

COURT: The main mast?

A. Yes, on the port side. Here on this side. They weren't broke off, but was only partly broke—a fracture. Now, I put these in. That is the side (indicating on picture) this is the beam, this is the gusset, they were broke down like this.

COURT: In this part here?

A. Yes, right abreast of the main—two of them were broke down there.

COURT: Now, you said the deck caulking was bad when she got into Portland?

A. Yes, sir.

COURT: Was that the full length?

A. The full length of the ship. I tested the deck from forward to aft.

COURT: You also said something about the cement being damaged from leaking.

A. Yes, sir, the cement in between decks was damaged.

COURT: In what part of the ship was that?

A. All over the ship where the cement was stowed, and the iron too, but I didn't notice that in between decks. I went over the tops of the barrels, and the barrels was badly stowed. I didn't go in the barrels.

COURT: Do you remember how far forward the cement was stowed?

A. I think about to here, if I recollect right. Too long ago to recollect. I have no notes, but I think about half ways, and a little under the fore house, and I think the after hatch. I didn't have no interest in the cargo, so I made no notes of it.

COURT: The water came in here, and through this chart house, and down this stairway, and down here?

A. It wouldn't get on the cargo in between decks. It would get on the cargo in the lower hold.

COURT: Would it reach the cargo in here?

A. No, sir, in the lower hold. It would come in here, and down here, and down to the sail room, and get on this deck.

COURT: On this deck down here?

A. On this deck down here, and then it would find a way along here, and run off the side stringers between decks, but any water in there couldn't damage the cargo in between decks, because when it got down to the store room, or sail room, it was several feet—five feet below where the cement was stowed, or seven feet below the deck.

COURT: Do I understand, from your examination, you concluded that the cargo damaged between decks was from leaks through the deck?

A. Leaks through the deck, and leaks from the bulwark stays that was carried away.

Mr. WOOD: My I interrupt? You speak of the bulwark stays. Are those the same things that have been called stanchions?

A. Yes, stays is the proper word. That is the nautical word, bulwark stays. In a wooden ship are called stanchions, but in an iron ship they go that way—up and down is stanchion. In a wooden ship we call them stanchions, and we get a little mixed up, but anything like that is a stay. Now, the stay is in that ship.

Mr. WOOD: Now, we have been talking about cement cargo, and cement around the stanchions, and the cement around the stanchions is just the filler to make the joints water proof, isn't it? It has nothing to do with the cement in the cargo?

A. No, no. The cement around there has not. It ought to be water tight when the rivets is put in hot, for some ships haven't cement.

(Mr. WOOD):

Why is this cement around the stanchions?

A. It strengthens the stanchions.

Mr. WOOD: What is the stuff?

A. You make the cement about half pure cement, the remainder course sand.

Mr. WOOD: How thick is it?

A. Around the stanchions—maybe one or two inches, maybe more. In other words, made to put a finish at the gutter way, at the side of the ship. It strengthens the gunwale angle iron.

Q. (Mr. McCAMANT): What percentage of the iron in this cargo was carried between decks, do you know?

A. No, sir, I don't know.

Q. Are you prepared to say there was less than 40 per cent of the iron in between decks?

A. I couldn't say anything about the cargo—don't know anything. I expressed myself as to my views as to what caused the damage, is all.

Q. What is your opinion based on, with reference to stowage, then, if you don't know where the cargo was stowed?

A. I know a little about it, but not too much.

Q. Do you know whether 40 per cent was between decks?

A. I don't know whether ten per cent or 40 per cent, only I seen it generally.

Q. Now, if as a matter of fact, there was 40 per cent of the iron aboard this ship, carried in between decks, you would modify your opinion then, with reference to the stowage?

A. No, sir, because I believe myself that the heft of

the cargo in the lower hold was the cause, with the heavy sea, of the ship's straining so much. I base it upon the condition I found the ship in, in the hold, and the working of the ship.

Q. Now, how much of the iron did you say ought to be in between decks?

A. I never went into them figures. I can't say.

Q. You don't know?

A. No. I based—the only thing I say is that I believe the ship had labored heavily, principally by the cargo being put low, and the heavy passage she made.

Q. Now, wasn't it the heavy passage which she made which accounts for the condition?

A. No, sir, I am slow to say that. I can't say that. I can't say it.

Q. You don't know anything about where that cargo was distributed then, do you?

A. Oh, I know a little, but not enough for to go into any figures.

Q. And yet you undertake to tell the Court, without knowing how the cargo was distributed—

A. Yes, sir.

Q. —that the ship labored because she had too much weight in her lower hold?

A. Yes.

Q. You do?

A. Yes, sir; yes. I figured from the condition I found the ship in. I don't say was exactly the cause of it., I say I believe that was the cause of it.

Q. Yet you don't know how much she did carry in the lower hold?

A. I seen it, but I couldn't go into the figures.

Q. Did you ever know how much of the cargo she carried in the lower hold?

A. No, never knew from any one, or never inquired—forgot all about the ship; had no call for inquiry, but forgot about it.

Q. Did you ever know how much of the iron was carried in between decks, and how much below?

A. No, but I told the captain too, on one day after he was partly discharged, that if he carried two more cargoes like that in that ship, that she would go to pieces.

Q. And you made that statement—

A. To the captain.

Q. —without knowing how much of the cargo had been in the lower hold, and how much between decks?

A. I didn't care what there was in the lower hold. I seen the condition the ship was in, and the way she worked, and I knew that was caused by the stowage or bad weather. I made that statement to the captain. If she carried two more such cargoes, and the ship went through two voyages, and was strained so, she would be a total wreck.

Q. What size vessels have you commanded?

A. Vessels most all sizes. Carried two cargoes of wheat in the *Andreta*, one of the biggest ships to Portland in those days; carried 2840 tons of wheat. I made three voyages here.

Q. Is that the largest vessel you have commanded?

A. That was the ship that carried the most. Had a ship a little bigger than her called the *Anglo-India* (?) She wouldn't carry as much cargo.

Q. Except those two did you ever have a ship carrying as much as 2,000 tons?

A. No.

Q. What was the capacity of your other ships?

A. Carry about 1,000, 700, 600, 150. I commanded somewhere about 20 ships in my time.

Q. Now, Captain, who knows the most about what sail a vessel should carry—the captain commanding her, who is familiar with the conditions, or the man sitting on the witness stand in the court room and undertaking to testify?

A. The man who commands the ship ought to know when it is time to shorten sail, and when it aint, but what I said, that it appeared to me the amount of sail she had was a great deal for the heft the wind was blowing. And I can't understand yet, with a blow that hard, how she could carry that sail. I don't know whether you had them sails on, or I never know whether blowing that hard. I only say, if blowing eleven, it is about ninety, which is more than a hurricane—that the sails could hardly stand it.

Q. Who knows best in regard to the distribution of the cargo—the man who makes a casual examination of the cargo and comes into court and testifies about it, or the captain who navigates the vessel and sees how she stands different kinds of weather?

A. In most times, the captain has very little to say about the cargo going aboard. It is the part of the stevedores and the ship captain and the surveyors.

Q. Well, who knows best about it, of the two individuals?

A. Oh, they make their calculations, I suppose, about the cargo to distribute the cargo—the surveyors and the stevedores.

Q. Who know best—the captain who commands the vessel, and observes the way she navigates in different kinds of weather, or the man who, at the port of destination, makes a casual examination of the cargo?

A. After the captain gets to sea, he may find the ship stiff. I have had it myself happen to me, where I have had to take up 70 tons of the cargo out of the hold.

Q. The captain who knows his business ought to be able to tell when the ship gets out to sea, whether her cargo is properly distributed.

A. Yes, a captain can generally tell this, but he can't shift the cargo always. I have had to put down cargo, too, found the ship too tender.

Q. Which is the worse fault—to have the ship too stiff, or too tender?

A. Well, either is bad. Either is bad, but if you have the ship too tender, you can put it down.

Q. Isn't it worse to have the ship tender and top heavy than to have it stiff?

A. If very tender and capsizes, it would be bad. But if the ship goes along and founders at sea, through being too stiff, it amounts to the same thing—she is gone anyway.

Q. Well, isn't there much graver danger from troubles coming from the ship being top heavy than being too stiff?

A. At the commencement of a voyage, it would be, because if she went out and got into difficulty right

away, she might capsize, but you can generally tell right away after you get to sea, if the ship was tender; practically before the pilot leaves her, and you can return back, put back into port, or can inject some cargo, as has been done many times for making the ship stiff.

Q. Captain, you have—you are familiar with a good many cargoes that have been stowed at Antwerp, under the direction of R. R. Baines, are you not?

A. Well, I ought to be. I was port warden here in Portland for six or seven years, under Governor Lord and Governor Geer, and was assitant port warden too; have been acting port warden for six or seven years, between port warden and assistant port warden.

Q. You know Captain Baines has been serving as inspector of stowage at Antwerp for a great many years?

A. Yes, sir.

Q. How do you regard him as a competent man?

A. He is a good competent man, sure.

Q. You would have respect for his judgment?

A. Sure; sure.

Q. His cargoes ordinarily come through in good shape?

A. Well, I wouldn't say that.

Q. You wouldn't say that?

A. No, I have had too many damaged cargoes to say that. I couldn't recollect that, only I know they were damages. I know I have had ships before come here, and captains tell me themselves how the ship rolled at sea; as the captain of French vessels, you know, can't speak English very good, he told me the ship was very strong at sea—rolled heavy.

Q. Well, I didn't ask you about that.

Mr. McCAMANT: I move to strike that out. What the witness said about what the captain told him is not competent.

COURT: Very well.

Mr. WOOD: I object to it being stricken out, because it was brought out by the counsel, and is a statement of the captain inquestion.

Mr. McCAMANT: Are you testifying as to what this captain told you—Captain Lebeaupin?

A. No, no, nothing to it. I was only—you went away from this ship. You went to other ships. I was trying to explain the best I could.

Mr. WOOD: Talking about what another captain said to this one.

A. No, no. I said I didn't care to go into those details, for I didn't know. However, I had ships before, loaded by this same man. At the same time, I know he is a good man. I have good confidence, but he might make a mistake.

Re-Direct Examination.

Q. I would like you to explain to the court what you mean when you say the caulking is soft.

A. Well, that means the caulking aint good.

Q. Well, in what way isn't it good?

A. Well, when I take the pitch out of the seam, I got what we call a making iron. It is a calking iron, a steel making iron. It has a flatter point. I put that down and hit it. If it goes a half inch, very well; but if it goes down an inch or an inch and a half, I say it is

soft; that is, in bad condition.

(Witness excused).

CAPTAIN LYDDON VEYSEY, a witness called on behalf of the libellant in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WOOD):

Q. Captain, do you live here in Portland?

A. Yes, sir.

Q. What is your present business?

A. Surveyor Lloyd's Register.

Q. And have you ever followed the sea?

A. Yes, sir.

Q. How long have you been a Lloyd's surveyor?

A. Since 1901—yes, 1901. 1902, I think. I am not quite sure.

Q. When did you leave the sea?

A. I left the sea in 1900.

Q. How long did you follow it?

A. Nearly 26 years.

Q. How long as master?

A. About 15 years as master.

Q. And what character of ships—sailing ships?

A. Yes, sailing ships and steam both.

Q. And wood or steel?

A. Iron and steel. I was never in command of a wooden ship.

Q. Have you read this extended protest for the Bab-in Chevaye?

A. Well, I just glanced through it. I didn't have

time to go through it carefully, but I think I have gained sufficient there to be able to answer.

Q. You went through it from end to end, did you?

A. Yes, I have just glanced through it.

Q. Well now, I will ask you whether—do you know the Babin Chevaye at all? Did you ever see her?

A. I was on board of her once.

Q. You know she is a French steel vessel?

A. French vessel.

Q. Barque?

A. Barque.

Q. With reference to that particular vessel, and considering the time of year and the voyage by the way of Hobart, I will ask you whether the weather indicated there is anything extraordinary which a ship has no reason to expect on that voyage?

Mr. McCAMANT: Objected to for the reasons indicated before to Captain Crowe's testimony.

A. Shall I answer that, your Honor?

COURT: You may answer.

A. It is generall understood, Mr. Wood, that when a ship leaves Europe in making the southern passage in high latitude that way, bad weather may be expected; therefore the ship is usually prepared for that, even to the extent of having their best set of sails bent, new ones if needed, and all the running gear in first-class shape, and everything to make that passage, for we always expect some bad weather during that passage.

Q. I will ask you whether it is anything unusual, on such a passage as that, for a deep sea ship, laden with

cargo, to have her decks constantly flooded with waves?

A. Now, that word "constantly flooded," Mr. Wood, do you mean by that that the decks were absolutely full of water from one complete end to the other? Is that what your inference is by being, you say, constantly flooded?

Q. Well, it is hard for me to say. That is a word translated in here, but I will say this—wait a minute—I will ask you what your understanding of the entry usually found in logs "decks constantly flooded" is? In my experience I have found it a very common entry, and I supposed it was a common term.

Mr. McCAMANT: I object to that as not a proper subject for expert testimony.

COURT: I think he may answer that.

A. May I answer that, your Honor?

COURT: Yes.

A. What is generally understood by being constantly flooded—the ship is running in a gale of wind. Of course naturally the sea is increased as the wind is increased, and when she breaks the waves with her flare, the waves running along side of the ship on each side, and double over on board as the ship is running along. Nothing very serious about it, because it is what we got to expect. That is what we term the water being constantly flooded. An with the motion of the ship from side to side, this water rushes from side to side—perhaps three or four feet of water, perhaps sufficient to wash over the rail. Perhaps once in awhile will take seas over a little heavier than others, which will fill that por-

tion of the ship and the water will run over the rail the other side as she rolls. But to be constantly flooded with water from one end to another—why, that isn't the meaning of that.

Q. Let's take it at the worst. Suppose it means for hours, or a day at a time, the decks are completely flooded with water. If the deck was a good water-tight deck when she started, is there anything in having this water on top that should make it leak?

A. Well, unless the ship is struck by a very heavy sea, broaching to, or something of that kind; for the whole volume of water weighing so many tons, and with considerable speed—about 18 knots an hour—might strike the ship and fall on her deck, then in the weakest part of the top, that is, around the hatches, and striking the house, it is liable to start the combings. Then we expect the decks to leak. In the ordinary sense, and shipping around the east and down, there is no reason ships should leak under ordinary conditions.

Q. When the vessel is rolling heavily and pitching, and there is very little water in the hold, can you, by sounding the pumps, can you catch what water there is in the hold?

A. Well, you would have to watch the steady water, or you would have to take the mean of sufficient soundings as would satisfy yourself. You understand when the water is washing from one side to another, it strikes the rod, and shoots up the sounding rod. You have to wait when the ship is not rolling so much, not constantly rolling. You couldn't take an exact sounding; you

would have to take the mean of ten or twelve to satisfy yourself.

Q. Would you say on a voyage around to Portland, it was unusual and extraordinary when only beaten out of her course by the gales, for—say three days, 48 hours of which you ran before the wind, and another day, or part of a day, you pointed into the wind as close as you could run, and the lowest sail carried was the lower fore topsail, the foresail, the lower main topsail, and the upper main topsail?

A. Well, that is the ordinary canvas to run under in these latitudes. That is the ordinary canvas to run with in those latitudes that time of the year.

Q. What would you say about the luck of the vessel only to have to go out of her course for two or three days on such a voyage?

A. That wouldn't be—that wouldn't be from force of wind, but from sea more than wind.

Q. Well, I say what would you say about it?

A. Well, it is often done. Of course my experience down there, five or six—seven or eight voyages, the high land might interfere too, sometimes. You get a very heavy southwest gale, and you have to heel the ship to; if close to the land; you cant keep her away some times—some times you can.

Q. Now take the Babin Chevaye, as you saw her, would you say that, as long as she was able to carry that spread of canvas, that she was undergoing extraordinarily severe weather?

A. Well, judging from that protest there, the ship

was making $10\frac{1}{2}$ knots. That doesn't seem to me she was carrying a very heavy press of sail, and I should judge from that, that the sea was worse than the wind.

Cross Examination.

(Questions by Mr. McCAMANT):

Q. Captain, suppose a vessel has been thoroughly inspected at Antwerp before leaving on a voyage for Portland by way of Hobarttown, and her poop deck has been found to be in good condition, the ship tight and staunch and strong in all respects, and she strikes a wave which breaks in her chart room door, and the wall of the chart room, and also the wheel house; what would that indicate with reference to the usual—whether that weather was usual or unusual?

A. Well, it isn't very common. Of course, ships will run some times, and poop; a very fine line ship with very little flare. When running down over a sea, her bow begins to pop up, and her stern pops down; sometimes cannot get the stern up on her before the next one, the next sea catches her, and according to that protest I read there, it was an exceptional sea, such as I never experienced in my life—all my life—where the crest was 30 feet above the rail of the ship, and of course that amount of water falling on top was liable to wash everything away unless it was stronger than the sea.

Q. You say you never saw a sea as high as that?

A. Never seen a sea break aboard a ship with crest 30 feet above the rail; a very large volume of water, very heavy.

Q. Isn't it unusual for a ship to be under water from rail to rail for any considerable length of time—the main deck from rail to rail, right up to the bulwarks?

A. No. In a very heavy gale of wind it often happens that a ship's midship section is full of water—probably for some times an hour or two hours together; that is, during the height of the gale. But I don't think those conditions will exist for day after day, but washing up on deck you have two or three feet of water, or four feet of water. It just depends.

Q. Suppose that condition did obtain day after day, a considerable part of the deck was under water to that extent, what would that indicate with reference to whether the weather was usual?

A. The weather is usual for this latitude.

Q. You think the weather is usual for that southern latitude?

A. We have the same conditions here; take the Columbia bar in the winter months—have bad weather on the bar 10 days at a time—three or four vessels attempting to cross the Columbia River bar; two will cross all right, the third one will take a sea and do other damage. That is a condition existing at this period of the year in those latitudes, but navigators know that—expect that, and get the ship in the best condition to stand any extraordinary weather she may encounter.

Q. Would it be usual to encounter six weeks of severe weather in that latitude?

A. Well, I don't think I have experienced that per-

iod—six weeks at a time.

Q. That would be very unusual, wouldn't it?

A. I don't know about very unusual. It has been experienced.

Q. That is, it would not be unprecedented, but would be unusual?

A. I don't know those terms, where it calls there. I am just giving you a general experience of navigators navigating those waters. Of course can't go down to very small—

Q. Now, Captain Veysey, suppose the port side of the deck house is reinforced with a plate of steel in addition to the wooden structure that is there, and it has been inspected at the inception of the voyage and found to be sound and strong, and a sea comes along, which stoves—by means of which that side of the house is stove in two inches, what would that indicate with reference to the force of that sea?

A. It means was a little unusually heavy sea struck that portion of the house, and it wasn't strong enough to resist the force of the sea. Maybe traveled about 15 or 16 miles an hour when it struck the ship, and that would add much greater force to its volume; that would also cause the combings to start a leak; at the same time it would affect the combings a little, probably start them a little from the deck, and let the water in down there.

Q. Would a sea strong enough to do that as it washed across the vessel, would it have any effect on the stanchions or bulwarks?

A. Yes, sometimes will.

Q. Even strong and well constructed vessels?

A. Oh yes, I can give you an instance of one of the North German Lloyd boats—a ship called the Atlantic Greyhound, in making a crossing of the Atlantic, it swept the whole deck coming across—148 passengers injured. I could quote other instances, one in the Bay of Biscay, for instance, davits five inches in diameter twisted like ordinary half inch wire, but this is exceptionally bad.

Q. And the fact that this accident occurred, does not indicate that the vessel herself was unseaworthy, does it?

A. No.

Q. You would regard a vessel, such as we have just been speaking of, a seaworthy vessel notwithstanding that accident overtook her?

A. Classed in the Bureau Veritas.

Q. Do you attach any importance to the fact that the vessel is classed by the Bureau Veritas?

A. Yes, a society for the classification of ships, and is considered by the underwriters to be good.

Q. It stands right in line with Lloyd's does it not?

A. Yes.

Q. In its standing throughout the world?

A. Yes, we accept their surveys on some occasions and they accept ours.

Q. And what character of men do they employ to do their work?

A. Beg pardon?

Q. What character of men do they employ to do

their work?

A. Sometimes they are draughtsmen out of ship-builder's yards, who know the architectural points of ships. Sometimes they are men who have done a lot of construction work, or superintended construction work, or, in some cases, they are shipmasters who have commanded all kinds of ships, and know by practical experience the weak points of a ship, having passed through various stages of inclement weather where they have had opportunity to judge any defect and report on it. These are the classes of men generally employed.

Q. And they are generally qualified?

A. Well, I presume so, Mr. McCamant.

Q. Are you familiar with the work of Mr. Garau-chot, who represented the Bureau Veritas at Antwerp, at the time this shipped was classed?

A. No, I don't know the gentleman. It was some years ago since I was in Antwerp.

Q. Are you familiar with the work of Captain R. R. Baines of Antwerp?

A. The stevedore in Antwerp?

Q. He is the captain who superintends the stowage of the cargoes.

A. No, I don't think he was there in my time. Captain Baxter was Superintendent.

Redirect Examination

Q. Captain Veysey, before you leave, your answer on that wave I think is open to some doubt as to what you do mean. You say that you never experienced a wave

with a crest 30 feet high. Do you know anything about—given any attention to the measurement of waves—waves' height?

A. What I said, Mr. Wood, was that I had never in my experience seen a crest of a wave 30 feet above the rail, coming aboard the ship, but as I understand, in reading the various jottings by scientific men, a sea has been known to reach 20 feet above its mean level; that would mean about 40 feet high from base to apex.

Q. Do you believe that wave was 30 feet above the rail?

A. I am not in position to dispute it, Mr. Wood.

Mr. McCAMANT: I object to that.

(Witness excused).

Libellant Rests.

CAPTAIN JOSEPH LEBEAUPIN recalled by the claimant.

Direct Examination.

(Questions by Mr. McCAMANT):

Q. Captain were you present on the Babin Chevaye when she was recaulked in Portland, in the fall of 1909?

A. Yes, most of the time.

Q. Did you observe the condition of the upper thread of the caulking which was removed on a portion of the vessel at that time?

A. Yes, I have.

Q. State what was the cause of the condition of the thread which was removed?

Mr. WOOD: Objected to until he shows some quali-

lication to know the cause. Is he to give his opinion?

Mr McCAMANT: He is going to tell exactly what happened, and how it happened.

A. (Through interpreter) He says there are two reasons for it. The first reason is: That during the three months that I was in bad weather the outside surface of the wood deck became soaked and communicated the moisture to the pitch, and made it rot a little. The second reason is: On account of the straining of the vessel, the seams of the deck opened up in certain places, and because the water could not get right through the seam down between decks, it followed the seams into the deck that had become soft; and as soon as the oakum once gets wet or soaked it rots gradually, and in every—at least only one thread had become affected.

Q. What was the condition of the other threads in the caulking underneath the top thread?

A. I don't know what the condition of those was, but it can be assumed that they were in good condition, because the iron that we put into it couldn't reach the bottom of it.

Q. Was there any condition— any difference between the condition of the caulking forward of the forecastle—between the forecastle and the bow, and the caulking in the remainder of the deck?

A. The surveyor for Veritas did not require the caulking of the deck forward of the forecastle because that part is less exposed to the water, and didn't require caulking.

Q. I am asking him about the condition of the deck

when she got to Portland in August, 1909. Was there any condition at that time—any difference at that time between the condition of the caulking forward of the forecastle, between the forecastle and the bow, and the caulkin of the remainder of the main deck?

A. The deck from aft until as far as the forecastle was in bad condition, but the other part from forward of the forecastle was perfectly intact, was in good condition.

Q. What explanation can you give for the difference?

A. The reason for that is that the after deck, the part that has been ordered to be recaulked was practically never free from water except probably one week in the whole three months of bad weather, whereas the front part very seldom was under water.

Q. What is the fact as to how tight—the main deck of this vessel was under water during these three weeks while the weather remained bad?

A. As far as I can remember, only a few days it was dry.

Q. How much of the day would the deck be covered with water?

A. During the bad weather, the deck was all the time under water; not exactly covered up to the bulwarks, but there was water on the decks right along during the bad weather days.

Q. During the whole 24 hours?

A. Yes.

Q. Now, state why you carried the sails which was indicated in your answers on the 6th and 12th of May,

1909. Take the 6th of May first.

A. On the 6th of May, I was sailing before the wind, with the wind. It was the only chance I had to keep the vessel going, and for the safety. The principal effects I had to observe was to keep the vessel in the proper direction; was full wind from behind, and without paying any attention to the course and to go faster than the sea, in order the sea would not ship on board. At that time I was going $10\frac{1}{2}$ knots, which I consider reasonable speed under the circumstances, and of the four sails I carried, two were forward of the two others, so the wind blew on the two ones aft, and protected the two forward ones.

Q. Suppose the vessel is running with the wind, or substantially with the wind, at the rate of $10\frac{1}{2}$ knots per hour, and the wind is blowing 21 knots an hour; what effect does the speed of the vessel have in moderating the strength of the waves and the sea on the vessel?

Interpreter: What effect the wind has?

Q. No, what effect the speed of the vessel.

Interpreter: To moderate.

Q. Yes, in moderating the effect of wind and seas on the vessel.

A. The strength of the wind would be the difference between the wind and the speed of the vessel.

Q. Will you make sure just what was the minimum sail carried on the 12th of May?

Interpreter: I don't remember now the exact terms. I haven't that book with me. If he gave it to me correct the other day—

Mr. WOOD: Let him put the French into the record, and we will translate it later.

A. **Misaine; petit hunier fixe; grande hunier fixe; petit foc.**

Q. Why did you carry this quantity of sail on the 12th of May?

A. I never saw the sails reduced more than this on vessels of similar tonnage. Never during the ten years that I have navigated, I saw lesser sail, and probably if I had tried to furl the other two forward sails, they would have torn to pieces, and injured the other sails; then all the sails would have gone. One is not always sure what maneuvers might be made.

Cross Examination.

(Questions by Mr. WOOD):

Q. Just show this part of the deck that was not recaulked here in Portland. (Showing blue print). Is that under the forecastle head?

A. Yes, here is the forecastle head.

Q. I didn't mean the foresttle head. It is a little different, I see. Is this covered here?

A. This is the deck, and this is the deck house here.

Q. And isn't this a bridge here?

A. Yes, this is a bridge.

Q. And where is the main deck, this?

A. Yes, this.

Q. What is stowed under here?

A. Cement. No, no, I don't know exactly whether the cement or the coke is here. I believe that the cement was stored from—I believe the cement came

as far as the foremast.

Mr. WOOD: That is all, except I move to strike out those assumptions and things he made in speaking about why the oakum was rotten.

COURT: Let it stand subject to your objection.
(Witness excused.)

Claimant Rests.

Mr. WOOD: I will ask leave, if I deem it necessary to amend the libel to accord with the proof so as to allege that one of the allegations of unseaworthiness is this hatch in the store room which was open, through which this large wave went. The proof is in, and I may conclude to amend.

COURT: Very well.

Libellant Rests.

Claimant Rests.

*In the District Court of the United States for the
District of Oregon.*

THE PRESIDENT OF THE UNITED STATES
OF AMERICA.

To R. T. Skinner, Esq., U. S. Consul General,,
Hamburg, Germany:

Greeting.

KNOW YE, That we in confidence of your wisdom, prudence and fidelity have appointed you a Commissioner, and by these Presents do give you full power and authority diligently to examine Herman Langkopf upon his corporal oath, or affirmation, before you to be taken and upon the interrogatories and cross-interrogatories hereto annexed, as witness on

the part of the Claimants in a certain cause now pending undetermined in the District Court of the United States of America for the District of Oregon, wherein George H. C. Meyer, et al., are libellants and Bureau Freres & Baillergeau are Claimants, and we do hereby require you, before whom such testimony may be taken, to reduce the same to writing, and cause it to be subscribed by each of said witnesses in your presence, and to close it up under your hand and seal, directed to the clerk of the above entitled court, at Portland, in the District of Oregon, as soon as may be after the execution of this commission; and that you return the same, when executed as above directed, with the title of the cause endorsed on the envelope of the commission.

WITNESS the Honorable Robert S. Bean, Judge of the District Court of the United States for the District of Oregon and the seal of said Court affixed at Portland, in said District, this the 4th day of December, A. D., 1911.

A. M. CANNON,
Clerk.

[Notice.]

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR.,
J. W. WILSON and JOHN M. QUAILE,
partners as MEYER, WILSON & COM-
PANY,

Libellants,

vs.

THE BARQUE BABIN CHEVAYE,

Defendants,

BUREAU FRERES & BAILLERGEAU,

Claimants.

TO THE ABOVE LIBELLANTS AND TO
MESSRS. WILLIAMS, WOOD & LINTHICUM,
Their Proctors:

You, and each of you, will take notice that defendant and claimant will apply to the Clerk of the above entitled Court on Monday, November 6, 1911, at the hour of 9:30 A. M., for a Commission directed to R. T. Skinner, United States Consul General at Hamburg, Germany, authorizing him to take the deposition of Hermann Langkopf on the direct interrogatories hereto attached and herewith served.

SNOW and McCAMANT,

Proctors for Defendant and Claimant.

DIRECT INTERROGATORIES TO BE PRO-
POUNDED TO THE WITNESS,
HERMAN LANGKOPF.

1. State your name, age, residence and occupation.
2. What experience have you had as a seafaring man?
3. What experience have you had in surveying or inspecting the hulls and decks of sailing ships?
4. What is the custom as to the time and manner in which the wooden decks of sailing vessels are caulked?
5. Who ordinarily does such caulking?
6. What has been your experience with reference

to keeping such decks water tight and in good condition by caulking done by the ships carpenter at sea?

7. Under what circumstances, if at all, would outside labor be customarily employed to caulk the decks of sailing vessels?

DISTRICT OF OREGON—ss.

Due service of the within Notice and Interrogatories is hereby admitted this 31 day of October, 1911.

WILLIAMS, WOOD & LINTHICUM,

Proctors for Libellants

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR.,
J. W. WILSON and JOHN M. QUAILE,
partners as MEYER, WILSON & COMPANY,

Libellants,

vs.

THE BARQUE BABIN CHEVAYE,

Defendant,

BUREAU FRERES & BAILLERGEAU,

Claimant.

Cross Interrogatories to be propounded to the witness HERMAN LANGKOPF:

1. If, in answer to direct interrogatory No. 2, you state you have had experience as a seafaring man, please state for how many years you have been employed in the navigation of ships, in what capacity; what character of ship, sailing or steam vessel, and in what capacity.

2. If, in answer to direct interrogatory No. 3 you

state you have had experience in inspecting hulls and decks of sailing vessels, please state the number of years you have been so employed; by whom you have been employed, and the number of hulls and decks inspected by you. Your answer will please relate only to sailing ships.

3. If you state the custom as to the time and manner of caulking the wooden decks of sailing vessels, please state on what facts your testimony is based; whether or not that custom is derived from facts which you have heard discussed, or whether such custom is based upon facts within your own particular knowledge, based upon your own personal experience.

4. If your answer to the cross interrogatory numbered 3 is based upon facts within your own knowledge, derived from your own personal experience, state with particularity how many cases have come under your own personal observation and of which you are personally aware. If your answer to cross interrogatory numbered 3 is based upon hearsay, state the number of cases which form the basis of such alleged custom with particularity.

5. If, in answer to the direct interrogatory numbered 4, you state that it is the custom for a ship to do caulking at sea, and that the same is done by the ship's servants, state whether or not such procedure is not always of generally adopted to expedite the prompt sailing of the ship from her port of loading, and if the same is not done to save expense to the ship.

6. Is it not the usual custom to caulk the decks of vessels while in the port of loading or of discharge, and is not outside labor customarily employed to do such caulking?

WILLIAMS, WOOD & LINTHICUM,

Isaac Hunt,

Prostors for Libellant.

DEPOSITIONS

of

HERMANN HEINRICH GUSTAV LANGKOPF, a witness on the part of the Claimants in a certain cause now pending undetermined in the District Court of the United States of America for the District of Oregon, wherein

GEORGE H. C. MEYERS, et al., are libellants,
and

BUREAU FRERES & BAILLERGEAU are claimants as follows:

FIRST. To the first direct interrogatory the witness saith: "My name is Herman Heinrich Gustav Langkopf, I am 42 years old, I reside at No. 13 Ohlen-dorffstrasse, Hamburg, and am ship's superintendent."

SECOND. To the second direct interrogatory the witness saith: "From 1885-1890 (five years) I have been employed before the mast, from 1890-1900 I was mate in sailing ships and steamers; from 1900-1905, master, and from 1905 until now I have been active as superintendent of ships."

THIRD. To the third direct interrogatory the witness saith: "In my present situation as superin-

tendent of the Aktien-Gesellschaft "Alster", Hamburg, a sailing ship Company, Limited, I have surveyed the hulls and decks of sailing ships."

FOURTH. To the fourth direct interrogatory the witness saith: "Wooden decks of sailing ships are caulked at sea by ship-carpenters, to my experience."

FIFTH. To the fifth direct interrogatory the witness saith: "Ship-carpenters as ship-servants."

SIXTH. To the sixth direct interrogatory the witness saith: "Such decks, as referred to have been kept in very good, tight condition."

SEVENTH. To the seventh direct interrogatory the witness saith: "Ship decks are caulked by labor from shore when the whole deck or part of it is to be renewed."

H. LANGKOPF.

[Seal.]

V. SYDOW.

Notary Public as Commissioner.

FIRST. To the first Cross Interrogatory the witness saith: "I have been employed 2 years as mate in sailing ships, 8 years as officer in steamer, (Kosmos Line), and 5 years as master in steamers."

SECOND. To the second Cross Interrogatory the witness saith: "Since 1905 I have been superintendent of the Aktien-Gesellschaft "Alster," Hamburg, a sailing ship Company, Limited, which owns 8 large sailing vessels. In this capacity I have inspected about 60 Hulls and Decks of sailing ships besides surveying occasionally for Underwriters."

THIRD. To the third Cross Interrogatory the witness saith: "My testimony is based upon my own

experience as well as upon such of other ship-overlookers and surveyors."

FOURTH. To the fourth Cross Interrogatory the witness saith: "I refer to my answer to cross interrogatory second."

FIFTH. To the fifth Cross Interrogatory the witness saith: "The caulking of the deck of sailing ships is not done at sea for the purpose of saving expenses and time but for the reason that the work is done far better by ship-carpenters at sea, where it can be done thoroughly during fine, dry weather under the continual control of master and mates, and where the caulking is paid for by time and not, as is generally the case with shore labor, by piece work."

SIXTH. To the sixth Cross Interrogatory the witness saith: "During seven years in which I handled about 60 sailing ships I have only in one occasion employed shore labor for caulking the deck when a part of the deck was renewed."

H. LANGKOPF.

[Seal.]

V. SYDOW,

Notary Public as Commissioner.

CITY AND STATE OF HAMBURG,

Empire of Germany—ss.

Reg. No. 187, 1912.

I, Carl Gustave Ferdinand von Sydow, Doctor of Law, a Notary Public in and for the Free and Hanseatic City of Hamburg, by lawful authority duly admitted and sworn do hereby certify and attest that I, the United States Consul General at Hamburg, Germany, not being competent for the examination of

German subjects as witnesses in suits pending before a United States Court, summoned Hermann Heinrich Gustave Langkopf, a witness on the part of the claimants in a certain cause now pending undetermined in the District Court of the United States of America for the District of Oregon, wherein George H. C. Meyer, et al., are libellants, and Bureau Freres & Baillergeau are claimants, to come before me and who appeared before me on the seventeenth day of January at elevent o'clock in the forenoon one thousand nine hundred and twelve in this city of Hamburg at my office situate at Nos 13 and 15 Grosse Backerstrasse, and after being sworn according to the affidavit hereunto attached marked A to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did, in my presence, subscribe the same.

And I further certify that I have subscribed my name to each half sheet thereof.

Done and passed at Hamburg this seventeenth day of January, 1912.

[Seal.]

V. SYDOW,

Notary Public as Commissioner.

This is the document marked A referred to in my certificate of this day. Hamburg, January 17th, 1912.

V. SYDOW,

Notary Public as Commissioner.

I, Hermann Heinrich Gustave Langkopf, ship's superintendent, residing at No. 13 Ohlendorffstrasse, Hamburg, make oath and say:

I have been requested to give evidence as a witness on the part of the Claimants in a certain cause now pending undetermined in the District Court of the United States of America for the District of Oregon, wherein,

GEORGE H. C. MEYERS, et al., are Libellants,
and

BUREAU FRERES & BAILLERGEAU are
Claimants.

I now solemnly swear to God the Almighty and Omniscent that to the best of my knowledge and belief I shall testify the truth, the whole truth, and nothing but the truth. So help me God!

H. LANGKOPF.

Sworn to by the above named Hermann Heinrich Gustav Langkopf, at Hamburg, this seventeenth day of January, 1912, before me,

[Seal.]

V. SYDOW,

Notary Public as Commissioner.

Filed April 9, 1912.

A. M. CANNON,

Clerk U. S. District Court.

*In the District Court of the United States for the
District of Oregon.*

THE PRESIDENT OF THE UNITED STATES
OF AMERICA.

To John Alfred Donnison, 147 Leadenhall St., London,

Greeting.

KNOW YE, That we in confidence of your wisdom, prudence and fidelity have appointed you a com-

missioner, and by these Presents do give you full power and authority diligently to examine George E. Pryde upon his corporal oath, or affirmation, before you to be taken and upon the interrogatories and cross-interrogatories hereto annexed, as witness on the part of the Claimants in a certain cause now pending undetermined in the District Court of the United States of America for the District of Oregon, wherein

GEORGE H. C. MEYER, et al., are libellants,

and

BUREAU FRERES & BAILLERGEAU are claimants and we do hereby require you, before whom such testimony may be taken, to reduce the same to writing, and cause it to be subscribed by each of said witnesses in your presence, and to close it up under your hand and seal, directed to the Clerk of the above entitled Court, at Portland, in the District of Oregon, as soon as may be after the execution of this commission; and that you return the same, when executed as above directed, with the title of the cause endorsed on the envelope of the commission.

WITNESS the Honorable Robert S. Bean, Judge of the District Court of the United States for the District of Oregon and the seal of said Court affixed at Portland, in said District, this the 4th day of December, A. D., 1911.

A. M. CANNON,
Clerk.

[Notice.]

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER JR., J.
W. WILSON and JOHN M. QUAILE, part-
ners as MEYER, WILSON & COMPANY,
Libellants,

vs.

THE BARQUE BABIN CHEVAYE,
Defendant,
BUREAU FRERES & BAILLERGEAU,
Claimant.

TO THE ABOVE LIBELLANT AND TO
MESSRS. WILLIAMS, WOOD & LINTHICUM,
Their Proctors:

You, and each of you, will take notice that defend-
ant and claimant will apply to the Clerk of the above
entitled Court on Monday, November 6, 1911, at the
hour of 9:30 A. M., for a commission directed to John
Alfred Donnison, Notary Public at 147 Leadenhall
Street, in the City of London, England, authorizing
him to take the deposition of George E. Pryde on the
direct interrogatories hereto attached and herewith
served.

SNOW and McCAMANT,
Proctors for Defendant and Claimant.
DIRECT INTERROGATORIES TO BE PRO-
POUNDED TO THE WITNESS,
GEORGE E. PRYDE.

1. State your name, age, residence and occupa-
tion.

2. What experience have you had as a seafaring man?

3. What experience have you had in surveying or inspecting the hulls and decks of sailing ships?

4. What is the custom as to the time and manner in which the wooden decks of sailing vessels are caulked?

5. Who ordinarily does such caulking?

6. What has been your experience with reference to keeping such decks water tight and in good condition by caulking done by the ship's carpenter at sea?

7. Under what circumstances, if at all, would outside labor be customarily employed to caulk the decks of sailing vessels?

DISTRICT OF OREGON—ss.

Due service of the within Notice and Interrogatories is hereby admitted this 31 day of October, 1911.

WILLIAMS, WOOD & LINTHICUM,

Proctors for Libellant.

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.
W. WILSON and JOHN M. QUAILE, part-
ners as MEYER, WILSON & COMPANY,
Libellants,

vs.

THE BARQUE BABIN CHEVAYE,
Defendant,
BUREAU FRERES & BAILLERGEAU,
Claimant.

Cross Interrogatories to be propounded to the wit-

ness GEORGE E. PRYDE:

1. If, in answer to direct interrogatory No. 2, you state you have had experience as a seafaring man, please state for how many years you have been employed in the navigation of ships, in what capacity; what character of ship, sailing or steam vessel, and in what capacity.

2. If, in answer to direct interrogatory No. 3, you state you have had experience in inspecting hulls and decks of sailing vessels, please state the number of years you have been so employed; by whom you have been employed, and the number of hulls and decks inspected by you. Your answer will please relate only to sailing vessels.

3. If you state the custom as to the time and manner of caulking the wooden decks of sailing vessels, please state on what facts your testimony is based; whether or not that custom is derived from facts which you have heard discussed, or whether such custom is based upon facts within your own particular knowledge, based upon your own personal experience.

4. If your answer to the Cross Interrogatory numbered 3 is based upon facts within your own knowledge, derived from your own personal experience, state with particularity how many cases have come under your own personal observation and of which you are personally aware. If your answer to Cross Interrogatory numbered 3 is based upon hearsay, state the number of cases which form the basis of such alleged custom with particularity.

5. If in answer to the Direct Interrogatory numbered 4, you state that it is the custom for a ship to do caulking at sea, and that the same is done by the ship's servants, state whether or not such procedure is not always or generally adopted to expedite the prompt sailing of the ship from her port of loading, and if the same is not done to save expence to the ship.

6. Is it not the usual custom to caulk the decks of vessels while in the port of loading or of discharge, and is not outside labor customarily employed to do such caulking?

WILLIAMS, WOOD & LINTHICUM,

Isaac D. Hunt,

Proctors for Libellant.

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.

W. WILSON and John M. 'QUAILE, part-
ners as MEYER, WILSON & COMPANY,

Libellants,

vs.

THE BARQUE BABIN CHEVAYE,

Defendant,

BUREAU FRERES & BAILLERGEAU,

Claimant.

I, George Estell Pryde, of No. 3 Fenchurch Avenue, in the City of London, England, Kingdom of Great Britain, being first duly sworn to tell the truth the whole truth, and nothing but the truth, in answer to the interrogatories and cross-interrogatories

annexed to the foregoing commission, depose and say as follows:

GEORGE E. PRYDE, Direct Examination.

To the first interrogatory I answer:

My name is George Estell Pryde, age fifty-seven of 3 Fenchurch Avenue, City of London. Surveyor.

To the second interrogatory I answer:

I have been at sea for about 32 or 33 years, for the last twenty years of this period I was in command of sailing ships.

To the third interrogatory I answer:

While I was at sea as Master it was my duty to see that the hull and decks of the vessels which I commanded were kept in good order and condition. Since I gave up going to sea, I have been superintending Surveyor for about fourteen years, and during that time I have been frequently employed in surveying sailing ships and their hulls, decks and rigging, both as Superintendent on behalf of Owners as Damage Surveyor and as Surveyor on behalf of Shippers of Cargo and intending purchasers. I do some surveying of steamers but my experience is chiefly with sailing ships.

To the fourth interrogatory I answer:

It is customanry for the caulking of the wooden decks of sailing ships to be done by the ship's carpenter as occasion arises. It is one of a ship's carpenter's chief duties both at sea and in port to see that the vessel decks are kept in good order and condition and properly caulked.

To the fifth interrogatory I answer:

The caulking is ordinarily done by the ship's carpenter.

To the sixth interrogatory I answer:

My experience has been that the caulking done by the ship's carpenter at sea and in port is sufficient to keep the decks watertight and in good condition.

To the seventh interrogatory I answer:

If the ship had received considerable deck damage or the decks were found to be severely strained, outside labor would be customarily employed to caulk the decks when the damage was being made good.

GEORGE E. PRYDE, Cross Examination.

To the first cross-interrogatory I answer:

I have been employed for over thirty years in the navigation of ships for the last twenty years of which time I was employed as Master of sailing ships.

To the second cross-interrogatory I answer:

I have been employed for about fourteen years in inspecting hulls and decks of sailing vessels. I am retained by John Stewart & Co., of 3 Fenchurch Avenue to survey all their sailing ships. They have thirteen ships and I superintend all repairs to their vessels. I am also engaged by Messrs. Balfour, Williamson & Co., to inspect the sailing ships on which they ship their cement in which they do a large business. I am employed by Anderson Anderson & Co., to survey sailing ships consigned to them in London and I also survey vessels with a view to purchase on their instructions. I also survey sailing ships for Messrs. Donaldson, Rose & Co., of Aberdeen, Gordon & Co., of Glasgow, Trinder, Anderson & Co., the British

Shipowners' Mutual Protection & Indemnity Association; John Holman & Sons and numerous other firms. I used to survey for Shaw, Saville & Co., but they are now giving up sailing ships.

To the third cross-interrogatory I answer:

My testimony is based on my own knowledge and experience as a Ship Master for twenty years and also as a Damage Surveyor and Superintendent for fourteen years.

To the fourth cross-interrogatory I answer:

While I was at sea I had command of seven vessels during the twenty years for which I was Master, all of which had wooden decks and I never employed outside labor to caulk the decks, all the caulking was done by the Carpenter. I have since had personal experience through surveying, drawing up damage specifications and superintending the repairs of a very large number of vessels during the past fourteen years of which it is impossible to give full details but in particular I am fully acquainted with all the work done on John Stewart & Co.'s thirteen vessels and the same custom is followed on those vessels. To the fifth cross-interrogatory I answer:

The caulking is not done by the ship's carpenter with the object of expediting the sailing of the ship from her port of loading nor with the object of saving expense to the ship. Every sailing ship of any size carries a ship's carpenter one of whose principal duties it is to keep the decks in order and properly caulked and there is no occasion to employ outside labor except in case of damage about the decks re-

quiring repairs by outside repairers.

To the sixth cross-interrogatory I answer:

It is not unusual for the ship's carpenter to be employed in caulking the decks of a vessel while in port but it is not customary to employ outside labor to do such caulking unless there has been damage about the decks requiring repairs by outside repairers.

G. E. PRYDE.

GEORGE ESTELL PRYDE.

Examination taken reduced to writing by me the Commissioner and by the witness subscribed and sworn to this eighth day of January, A. D., 1912, Before me.

[Seal.]

JOHN DONNISON,

Notary Public.

A Commissioner to Administer Oaths in the Supreme Court of Judicature in England.

KINGDOM OF GREAT BRITAIN,

City of London—ss.

This is to certify that I, John Alfred Donnison, of the City of London (England), Notary Public, duly admitted and sworn by virtue of the foregoing Commission to me directed, caused the above named George Estell Pryde the Deponent therein mentioned, to come before me in the said City of London on the eighth day of January, A. D., 1912, and that the foregoing deposition subscribed by said deponent was taken before me at my office, No. 147 Leadenhall Street, in said City of London on the date last named between the hours of two o'clock p. m. and six o'clock p. m. of said day and the same was by me reduced to

writing. That before proceeding to the examination the said Deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories annexed and thereupon he made and gave the foregoing answers; that the said Deposition when completed was by me read to said Deponent and the same was thereupon by him in my presence subscribed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Seal of Office this eighth day of January, A. D., 1912.

[Seal.]

JOHN DONNISON,

Notary Public.

A Commissioner to Administer Oaths in the Supreme Court of Judicature in England.

Filed April 9, 1912.

A. M. CANNON,

Clerk U. S. District Court.

*In the District Court of the United States for the
District of Oregon.*

THE PRESIDENT OF THE UNITED STATES
OF AMERICA.

To Louis Goldschmid, U. S. Consul at Nantes,
France,

Greeting.

KNOW YE, That we in confidence of your wisdom and fidelity have appointed you a Commissioner, and by these presents do give you full power and authority diligently to examine Hippolyte Bureau upon his corporal oath, or affirmation, before you to be taken

and upon the interrogatories and cross-interrogatories hereto annexed, as witness on the part of the Claimants in a certain cause now pending undetermined in the District Court of the United States of America for District of Oregon, wherein

GEORGE H. C. MEYER, et al., are Libellants,
and

BUREAU FRERES & BAILLERGEAU are Claimants and we do hereby require you, before whom such testimony may be taken, to reduce the same to writing, and cause it to be subscribed by each of said witnesses in your presence, and to close it up under your hand and seal, directed to the Clerk of the above entitled Court, at Portland, in the District of Oregon, as soon as may be after the execution of this commission; and that you return the same, when executed as above directed, with the title of the cause endorsed on the envelope of the commission.

WITNESS the Honorable Robert S. Bean, Judge of the District Court of the United States for the District of Oregon and the seal of said Court affixed at Portland, in said District, this the 4th day of December A. D., 1911.

A. M. CANNON,
Clerk.

[Notice.]

*In the District Court of the United States for the
District of Oregon.*

GEROGE H. C. MEYER, H. L. E. MEYER, JR., J.
W. WILSON and JOHN M. QUAILE,

partners as MEYER, WILSON & COMPANY,

Libellants,

vs.

THE BARQUE BABIN CHEVAYE,

Defendant,

BUREAU FRERES & BAILLERGEAU,

Claimant.

TO THE ABOVE LIBELLANTS AND TO
MESSRS. WILLIAMS, WOOD & LINTHICUM,
Their Proctors:

You, and each of you, will take notice that defendant and claimant will apply to the Clerk of the above entitled Court on Monday, November 6, 1911, at the hour of 9:30 A. M., for a Commission directed to Louis Goldschmid, Consul of the United States at Nantes in the Republic of France, authorizing him to take the deposition of Hyppolyte Bureau on the direct interrogatories hereto attached and herewith served.

SNOW and McCAMANT,

Proctors for Defendant and Claimant.

DIRECT INTERROGATORIES TO BE PRO-
POUNDED TO THE WITNESS
HYPPOLYTE BUREAU.

1. State your name, age, residence and occupation.
2. What, if any, official connection do you have with the claimant, Bureau Freres & Baillergeau?
3. How many sailing vessels does this corporation own?
4. What experience have you had as owner of sail-

ing vessels, or as a seafaring man, or in any other capacity which advises you of the customs with reference to the care of sailing vessels? State fully.

5. What is the custom with reference to the caulking of wooden decks of sailing vessels, as to when and where it is done and by whom?

6. State whether in your experience caulking in the manner described by you in response to the last interrogatory is sufficient to keep the wooden decks of said vessels water tight and in good order and condition.

7. What has been the custom of Bureau Freres & Baillergeau with reference to caulking the wooden decks of the Babin Chevaye and other vessels owned by it?

8. Under what circumstances, if at all, would caulking of the wooden decks of sailing vessels be done by outside labor?

9. What was done with reference to the equipment of the Babin Chevaye before she sailed from Antwerp on or about the 16th of February, 1909?

10. State whether or not the equipment so provided was adequate and appropriate to the voyage around Cape Horn to Portland, Oregon.

11. How was the Babin Chevaye manned on that voyage? State fully.

12. What was the complement of officers and crew provided for the Babin Chevaye on the said voyage?

13. State whether or not the manning of the vessel as testified to by you in response to the last two

interrogatories, was adequate and appropriate to her voyage around Cape Horn to Portland, Oregon.

14. What was done with reference to supplying the Babin Chevaye with what was needed prior to her voyage from Antwerp on the 16th of February, 1909?

15. State whether the supplies so furnished the vessel were adequate and appropriate to her voyage from Antwerp around Cape Horn to Portland, Oregon.

DISTRICT OF OREGON—ss.

Due service of the within Notice and Interrogatories is hereby admitted this 31 day of October, 1911.

WILLIAMS, WOOD & LINTHICUM,

Proctors for Libellant.

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.

W. WILSON and JOHN M. QUAILE, part-
ners as MEYER, WILSON & COMPANY.

Libellants,

vs.

THE BARQUE BABIN CHEVAYE,

Defendant,

BUREAU FRERES & BAILLERGEAU,

Claimant.

Cross Interrogatories to be propounded to witness,
HYPPOLITE BUREAU.

1. You will please state what the Hyppolite Bureau is: whether or not an association of individuals or a corporation, and if a corporation, under the laws

of what nation or state.

2. In answering direct interrogatory No. 4, you will please confine your answer to the experience of the Hyppolite Bureau, and not inject personal experience as an officer of said Hyppolite Bureau. If your answer is based upon the experience of Hyppolite Bureau, state how such experience is gained and if the same is based upon information gained by the reports and conversations of the officers of your vessels.

3. If in answer to direct interrogatory 5, you state what the custom is with reference to the caulking of the wooden decks of sailing vessels, please state the source of your knowledge of such custom, and please state fully the source of your knowledge as to when and where and by whom such custom is adopted.

4. In your answer to direct interrogatory 6, you will please state whether or not your experience in caulking in the manner described in answer to interrogatory 5 is gained by actual direction by yourself as an officer of the Hyppolite Bureau, or whether such custom obtains, to your knowledge by hearsay. If you state the custom as to the time and manner of caulking the wooden decks of sailing vessels, please state with particularity how many cases have come under your own personal observation and of which you are personally aware.

5. If you state that it is the custom for a ship to do caulking at sea and the same is done by the ship's servants, state whether or not such procedure is not always or generally adopted to expedite the prompt sailing of the ship from her port of lading, and if the

same is not done to save expense to the ship.

6. You will please state whether or not it is the usual custom to caulk the decks of vessels in the port of loading or of discharge, and whether or not outside labor is customarily employed to do such caulking.

7. You will please state upon what facts you base your answer as to whether or not the manning and equipment of the BABIN CHEVAYE was adequate and appropriate to her voyage around Cape Horn to Portland, Oregon.

WILLIAMS. WOOD & LINTHICUM,

Isaac D. Hunt,

Proctors for Libellant.

Deposition of witness produced, sworn and examined on the third day of January, in the year of our Lord, one thousand nine hundred and twelve, at the office of Louis Goldschmidt, Consul of the United States of America, in the city of Nantes, department of Loire-Inferieure, France, under and by virtue of a Commission issued out of the District Court of the United States for the District of Oregon, to Louis Goldschmidt, directed for the examination of witnesses in a certain cause pending in said Court, wherein George H. C. Meyer, et al., are libellants plaintiffs, and Bureau Freres et Baillergeau are claimants defendant.

Hippolyte Bureau, of Nantes, ship-owner, aged 37 years and upwards, being duly sworn and examined on the part of the defendant, doth depose and say as follows:

To the first interrogatory he saith:

Jules Pierre Hippolyte Bureau, 37 ans, armateur.

Translation: Jules Pierre Hippolyte Bureau, 37 years old, ship-owner.

To the second interrogator he saith:

Associe dans la maison Bureau Freres et Baillergeau.

Translation: Partner in the firm Bureau Freres et Baillergeau.

To the third interrogatory he saith:

La maison Bureau Freres et Baillergeau possede 5 navires.

Translation: The firm Bureau Freres et Baillergeau own 5 sailing ships.

To the fourth interrogatory he saith:

Je suis armateur de voiliers depuis 11 ans. Je m'occupe de ces affaires d'armement comme associe-directeur depuis cette epoque. Je n'ai jamais ete marin.

Translation: I have been an owner of sailing ships since 11 years. I have dealt with the business of ship-owner as partner and manager during this period. I have never been a seafaring man.

To the fifth interrogatory he saith:

Les reparations des ponts des navires a voiles ont toujours ete faites par le Charpentier-Calfat du bord pendant le cours du voyage. C'est un usage constant pour tous les navires a voiles. Les reparations de salfatage des ponts ne sont jamais faites par les ouvriers du dehors, a moins que le navire ne soit dans un dock, pour y faire d'autres reparations, et qu'il ait eprouve des avaries a ces ponts, ou que ces ponts

aient fatigue. En tout autre circonstance les reparations faites par les Charpentiers-Calfats sont absolument suffisantes pour conserver le pont en parfait état.

Translation: The repairs to the decks of sailing vessels have always been done by the Carpenter on board in the course of voyage, as is the invariable practice on all sailing vessels. Caulking and repairs to the decks are never done by outside workmen unless the vessel is in dock undergoing other repairs, and has sustained damage to her decks or has had her decks strained. In all other circumstances the repairs done by the Carpenter on the voyage are quite sufficient to keep the decks of the vessel in perfect condition.

To the sixth interrogatory he saith:

Absolument suffisant.

Translation: Absolutely sufficient.

To the seventh interrogatory he saith:

Pour ma maison qui comprend 5 navires a voiles, il est d'usage que le calfatage et les reparations au pont soient faites par le Charpentier-Calfat, et cet usage nous a paru toujours donner complete satisfaction.

Translation: For my firm which owns 5 sailing ships it is our practice that caulking and repairs to the decks be done by the ship's carpenter, and this practice has always been quite satisfactory.

To the eighth interrogatory he saith:

Les reparations de calfatage ne sont jamais faites par les ouvriers du dehors, que lorsque les navires sont dans le dock pour y faire d'autres reparations, et

qu'ils ont eprouve des avaries a ces ponts on que ces ponts ont fatigue.

Translation: The repairs of caulking are never made by outside workmen, unless ships are in dock undergoing other repairs, and have sustained damage to their decks, or have had their decks badly strained.

To the ninth interrogatory he saith:

Le navire etait arrive a Anvers en bon etate, et conformement a l'usage il est passe en cale seche pour y carener, c'est-a-dire nettoyer et peindre. Les ponts et les autres parties du navire ont ete examines et trouves en bonne condition. Le navaire a ete visite par les experts du Bureau Veritas et sa classe a ete maintenue. Toutes les provisions et equipement necessaires pour le voyage ont ete mises a bord.

Translation: The ship arrived at Antwerp in good condition. In accordance with usage she was put into dry dock to clean and paint the bottom. The decks and other parts of the vessel were examined and found to be in good condition. The vessel was examined by the surveyors of the Bureau Veritas, and her class fully maintained. All the stores and equipment necessary for the voyage were put aboard.

To the tenth interrogatory he saith:

Absolument suffisant.

Translation: Absolutely sufficient.

To the eleventh interrogatory he saith:

Le Babin-Chevaye avait un equipage compose de 25 men, comprenant:

(1). 1 Capitaine.

- (2.) 1 second capitaine.
- (3.) 1 lieutenant premier maitre.
- (4.) 1 deuxieme maitre.
- (5.) 1 mecanicien.
- (6.) 1 charpentier.
- (7.) 1 cuisinier.
- (8) to (20). 13 matelots.
- (21) (22). 2 matelots legers.
- (23) (24). 2 novices.
- (25). 1 mousse.

Translation: The Babin-Chevaye had on board a crew of 25 men as follows:

- (1). 1 captain.
- (2). 1 second captain.
- (3). 1 lieutenant.
- (4). 1 second mate.
- (5). 1 engineer.
- (6). 1 carpenter.
- (7). 1 cook.
- (8-20). 13 sailors.
- (21-22). 2 young sailors.
- (23-24). 2 novices.
- (25). 1 boy.

To the twelfth interrogatory he saith:

L'armement comme indique ci-dessus: 22 hommes et 3 officers.

Translation: As stated above; in all 22 men and 3 officers.

To the thirteenth interrogatory he saith:

Absolument suffisant.

Translation: Absolutely sufficient.

To the fourteenth interrogatory he saith:

Nous avons reçu avis de notre capitaine de tout ce qui était nécessaire, et après avons établi soigneusement la liste de rearmement; nous avons fait mettre abord tout ce qui était nécessaire.

Translation: We have received advices from our captain as to what was required, and acting upon the list of stores and upon our own knowledge of what was required for the voyage, the necessary supplies were provided.

To the fifteenth interrogatory he saith:

Je considère que tout était complètement suffisant.

Translation: I consider all was absolutely sufficient.

Cross Interrogatory.

To the first cross interrogatory Jules Pierre Hippolyte Bureau saith:

Je, Hippolyte Bureau, ne suis pas une corporation, je suis une personne. Je suis associé dans la maison Bureau frères et Baillergeau. C'est une maison d'individus.

Translation: I, Hippolyte Bureau, am not a corporation, I am an individual. I am a partner in the firm Bureau frères et Baillergeau. It is a firm of individuals.

To the second cross interrogatory he saith:

J'ai déjà expliqué que Hippolyte Bureau n'est pas une corporation, mais un individu. Je suis Hippolyte Bureau, descendant d'une famille qui est depuis plus de cent ans dans l'armement. Mon grand-père et mes oncles étaient eux-mêmes armateurs, et mon experi-

ence d'une connaissance pratique de l'armement est acquie par de longues annees dans les affaires, et mon experience personnelle date de nombreuses annees.

Translation: I have already explained that Hippolyte Bureau is not a corporation but an individual. I am Hippolyte Bureau, coming from a family which since over 100 years are ship-owners, my grand-father and my uncles were themselves ship-owners, and my experience of a practical knowledge of shipping, is acquired from many years in this business, and my personal experience dates from a considerable number of years.

To the third cross-interrogatory he saith:

Ma connaissance est acquise par ma propre experience d'armateur en general, et par mes relations avec les autres armateurs.

Translation. My knowledge is gained from my own experience as a ship-owner generally, and from my intercourse with other ship-owners.

To the fourth cross-interrogatory he saith:

Mon experience est basee sur la connaissance des choses acquise par l'usage. Cela a ete la coutume suivie par ma maison depuis les onze dernieres annees, et par moimeme depuis treize ans.

Translation: My experience is based upon knowledge of such things acquired by general custom of what is necessary and customary. It has been the custom followed by my firm for the last 11 years, and by myself since 13 years.

To the fifth cross interrogatory he saith:

Le calfatage est fait a la mer excepte dans les cir-

constances speciales decrites aux paragraphes 5 et 8 de l'interrogatoire direct, parce qu'il est prouve par l'experience que c'est la meilleure facon de proceder. Ce n'est pas une question de delai.

Translation: Caulking is done at sea except in the special circumstances described in answers to the direct interrogatories 5 and 8, because it is found by experience to be the best course which can be followed. It is not a matter of expedient.

To the sixth cross interrogatory he saith:

Ce n'est pas la coutume.

Translation: It is not the custom.

To the seventh cross-interrogatory he saith:

Je connais par ma propre experience quel equipage et quel equipement sont necessaires pour un navire tel que le Babin-Chevaye, pour un voyage a Portland, Oregon, par le Cap Horn, et je sais que le Babin-Chevaye etait ainsi commande et equipe. Je connais cela par la liste d'equipage avec lequel le navire est parti, et par les informations que j'ai recues sur l'equipe ment du navire.

Translation: I know from my own experience what crew and equipment are necessary for a ship such as the Babin-Chevaye, for a voyage around Cape Horn to Portland, Oregon, and I know that the Babin-Chevaye was so manned and equipped. I know this from the crew list with which the vessel sailed and from information I received of the vessel's equipment.

HIPPOLYTE BUREAU.

Examination taken, reduced to writing and by the

witness subscribed and sworn to this third day of January, 1912.

LOUIS GOLDSCHMIDT,

Consul of the United States of America, Commissioner.

RAOUL THOMAZEAU,

Sworn Interpreter.

Expenses in connection with execution of commission:

Official fees	\$13.50 fr.	70.20
Other expenses:		
Interpreter, Thomazeau's bill		40.00
Stenographer		30.00
Total fr.		<u>\$140.20</u>

{ AMERICAN
CONSULAR
SERVICE
{ FEE STAMPS

Filed April 9, 1912.

A. M. CANNON,
Clerk U. S. District Court.

[Stipulation.]

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.
W. WILSON and JOHN M. QUAILE, part-
ners as MEYER, WILSON and COMPANY,
Libellants,

vs.

THE BARK BABIN CHEVAYE,

Defendant,

BUREAU FRERES & BAILLERGEAU,

Claimant.

It is stipulated by and between the parties to the above entitled cause, that the testimony of the witnesses R. R. Baines, E. Meeuwissen, E. Garnuchot and Lauwers, witnesses for defendant and claimant, may be taken before any Notary Public or United States Consul, resident at Antwerp, in the Kingdom of Belgium, on the interrogatories and cross interrogatories hereto annexed. That prior to giving the testimony the said witnesses shall each be duly sworn to tell the truth, the whole truth and nothing but the truth, and that the testimony of the said witnesses, when certified by the officer taking the same as aforesaid, to have been taken under oath in manner and form as aforesaid, shall be received as evidence in this cause, subject to all objections entered at the time when the testimony was offered, on the ground of competency, relevancy or materiality, all objections as to the manner of taking the same being hereby waived.

It is further stipulated that the testimony may be taken by the aid of an interpreter, impartial and indifferent between the parties, who shall be selected by the officer taking the testimony.

It is further stipulated that the officer taking the testimony may employ a stenographer to reduce the same to writing, but each witness shall read or have read to him the extended transcription of shorthand

notes and shall sign the same.

WILLIAMS. WOOD & LINTHICUM,

Proctors for Libellants.

SNOW and McCAMANT,

Proctors for Defendant and Claimant.

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.

W. WILSON and JOHN M. QUAILE, part-
ners as MEYER, WILSON and COMPANY,

Libellants,

vs.

THE FRENCH BARK "BABIN CHEVAYE,"

Defendant,

BUREAU FRERES & BAILLERGEAU,

Claimant.

To the Owners of the "Babin Chevaye," and

To Messrs. Snow and McCamant, their proctors:

Please produce at the hearing of the witnesses whose testimony is taken under stipulation hereto annexed testimony showing when the Babin Chevaye was last completely overhauled and her decks completely re-caulked, prior to any re-caulking done preparatory to the voyage of February, 1909; also the bills showing the amount expended on re-caulking her main deck preparatory to the voyage in question, giving the amount of material used, the number of men employed and the time employed.

WILLIAMS, WOOD & LINTHICUM,

Proctors for Libellants.

DIRECT INTERROGATORIES TO BE PRO-
POUNDED TO THE WITNESS, R. R.
BAINES.

1. State your name, age, residence and occupation.

2. How long has your occupation been as stated in Interrogatory Number 1 and where have you been located in the exercise of your occupation as aforesaid?

3. What experience have you had, if any, as a seafaring man?

4. Are you familiar with the stowage of cargo on French sailing vessels? If so, state how you have become familiar with the usual and proper method of such stowage.

5. How do French sailing vessels compare in construction with British sailing vessels with reference to the weight of their superstructure?

6. What, if any, difference does this make with reference to the distribution proper to be made of the cargo as between the hold and the between decks?

7. Is there any general rule applicable to French sailing vessels with reference to the distribution of cargo as between the hold and the between decks?

8. If there is such rule, let the witness state it.

9. Is such rule a rigid and inflexible rule or does it vary with the construction of different sailing vessels and with the character of the cargo?

10. Are you familiar with the French Bark Babin Chevaye?

11. Are you familiar with the stowage of the car-

go upon the said vessel prior to her voyage from Antwerp, Belgium, to Portland, Oregon, beginning on the 16th of February, 1909?

12. State how you become familiar therewith.

13. State how many tons of cargo were stowed in the lower hold on the said voyage and of what the cargo so stowed consisted. State fully.

14. State how many tons of cargo were stowed in the between decks on the said voyage and of what the same consisted. State fully.

15. State fully any other facts within your knowledge with reference to the stowage of the said cargo and the protection of the same.

16. Do you remember the condition of the iron and the steel carried by the said vessel at the time when it was received for loading in the said ship?

17. What was the condition of the iron and steel with reference to rust?

18. What was the cause of the condition as aforesaid?

19. What was the condition of the weather at the time when the iron and steel reached the dock for loading on the Babin Chevaye?

20. What examination did you make of the Babin Chevaye prior to her voyage from Antwerp in February, 1909? State fully.

21. What did you find on such examination with reference to the decks of the vessel?

22. What did you find with reference to the stanchions and rivets?

23. State generally what was the condition of the

vessel with reference to seaworthiness at the time when you made such examination.

24. What is the Bureau Veritas?

25. What is the practice of the Bureau Veritas with reference to the examination of a vessel before approving of her for marine insurance?

26. Who was the local representative of the Bureau Veritas at Antwerp in February, 1909?

27. What, if any, examination did he make of the Babin Chevaye to your knowledge? State fully any facts within your knowledge with reference to the thoroughness of such examination?

28. What, if any, repairs or renewals were made on the Babin Chevaye at Antwerp prior to her voyage beginning February 16, 1909? State fully.

29. State under what deck the cargo of the Babin Chevaye was stowed.

30. Was any of the same stowed under the poop deck?

31. Was it possible for leakage in the poop deck to damage the cargo of the Babin Chevaye?

32. Is it usual to do caulking on the poop deck during the voyage?

33. Are there any reasons for caulking the poop deck on the voyage rather than in port?

34. State your opinion with reference to the equipment of the Babin Chevaye for her said voyage beginning February 16, 1909.

35. State whether she was properly manned for such voyage.

36. State whether she was furnished with the nec-

essary supplies.

37. State any other facts in your knowledge material to the issues in this case.

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.
W. WILSON and JOHN M. QUAILE, part-
ners as MEYER, WILSON & COMPANY,
Libellants,

vs.

THE FRENCH BARK "BABIN CHEVAYE,"
Defendant,
BUREAU FRERES & BAILLERGEAU,
Claimant.

CROSS INTERROGATORIES TO BE PRO-
POUNDED TO THE WITNESS, R. R.
BAINES.

1. If you state that there is a difference between British and French vessels as to weight of superstructure, state in what particular portions of the superstructure the difference arises; describe precisely what the difference is, if you have not done so, and state whether this difference is general and will be found in every French sailing ship as contrasted with every British sailing ship?

2. If you say that there is a rule for the stowage of cargo in French sailing vessels with reference to the distribution of cargo as between the hold and the 'tween decks, state the rule in the most definite terms in which it can be stated.

3. Would the rule be the same for a cargo com-

posed wholly of lumber as for a cargo composed wholly of pig iron or steel rails?

4. Would the rule be the same for the stowage of a cargo of cotton bales as compared with a cargo of copper ores?

5. Would the rule be the same for the stowage of a cargo of coal as compared with the stowage of a cargo of flour?

6. Would the rule be the same for the stowage of a cargo of all of one commodity as for the stowage of a general or mixed cargo of various commodities?

7. Would the rule be the same for a ship which naturally—that is to say, empty and without ballast,—was tender or cranky as compared to a vessel which in the same condition was stiff?

8. Would the rule be the same for a vessel which answered her helm better when she was down by the head as it would be for a vessel that steers better if down by the stern?

9. Would the rule be the same for a vessel which made better weather by being down by the stern as it would for a vessel which made better weather by being down by the head?

10. Would the rule be the same for a vessel that made better speed on an even keel as it would for a vessel which made better speed when being down by the stern?

11. State fully how the rule, if there be such a rule, is applied in practice.

12. If you state you are familiar with the stowage of the cargo of the *Babin Chevaye* on her voy-

age from Antwerp to Portland, Oregon, beginning the 16th of February, 1909, state whether you were personally present at all hours and at all times and personally inspected the stowage of **such** cargo.

13. If you state that you were present during the entire time of the stowage of the cargo, state whether the master of the Babin Chevaye was also present during such entire period, or state when he was present and supervising the stowage.

14. If you state that the iron or steel carried by the vessel at that time was rusty when received for loading in the ship, state whether it was fresh water rust or salt water rust.

15. State whether the rust was flaky or a mere powder over the surface.

16. State, if you know, what was the occasion of the rust.

17. Where was the iron and steel in question stowed prior to its being put into the hold of the vessel?

18. How long was the iron or steel exposed to the weather, if at all, before it was put into the hold of the vessel?

19. 'Question 23 is objected to as calling for a conclusion of fact and law.

20. When did you commence the examination of the Babin Chevaye prior to her voyage from Antwerp to Portland, Oregon, in February, 1909? Give the date and the hour.

21. When did you conclude the examination? Give the day and the hour.

22. State how many hours altogether you were occupied in making the examination.

23. State what means you adopted for testing the stanchions and rivets.

24. State whether the vessel had recently been re-painted or seemed to be recently re-painted.

25. State whether the rivet heads were covered with paint.

26. State whether the stanchion joints were covered with paint.

27. Which decks of the vessel did you examine at this time?

28. Who asked you to inspect the vessel?

29. What was the occasion of the inspection; for what purpose was it made?

30. If you state that the local representative of Bureau Veritas at Antwerp made an examination of the Babin Chevaye, state why he made it, if you know, and at whose request.

31. State for what purpose he made it—whether to qualify the vessel for marine insurance or not.

32. Were you present with him during the entire time of his inspection?

33. If not, state how much of his inspection you are acquainted with from your own personal observation.

34. What decks of the vessel did you examine?

35. State just how long you were on the examination and how it was made.

36. What decks of the vessel did he examine?

37. State how he conducted the examination and

how long he was at it.

38. Was your examination and was his examination made with special reference to the seaworthiness of the vessel in classing her for marine insurance?

39. Have you any interest in the Babin Chevaye? If so state what it is.

40. Who employs you generally?

41. Who pays you?

42. Who employed you and paid you for whatever inspection you made of the Babin Chevaye or her stowage? State facts fully.

43. If you state that repairs or renewals were made on the Babin Chevaye prior to its voyage state why they were made and state particularly the time employed and the manner in which they were made.

44. If you say that it was not possible for leakage in the poop deck to damage the cargo of the Babin Chevaye state particularly why not. Give a full explanation.

45. What is the purpose of the poop deck?

46. Is it necessary it should be water tight and seaworthy?

47. Question 31 is objected to as calling for a conclusion.

48. Question 32 is objected to as irrelevant and immaterial.

49. Question 33 is objected to as irrelevant and immaterial.

50. If you say it is usual to calk a poop deck during the voyage, state also whether it is usual to do any other deck caulking during the voyage. If so, what caulking?

51. Have you ever known the main deck to be re-caulked after the commencement of a voyage?

52. If you say you have known such re-caulking to be done state the facts and circumstances.

53. Is it not true that vessels prefer to do their own deck re-caulking during the voyage with their own crew, to save expense?

54. Questions 34, 35 and 36 are objected to as incompetent, irrelevant and immaterial.

55. If you state the Babin Chevaye was properly manned and properly equipped and furnished with the necessary supplies, state on what facts you base your conclusion in each case.

56. State how you know the facts on which you base your conclusion in each case.

57. Give what you consider the proper equipment for such a vessel as the Babin Chevaye on a voyage around the Horn from Antwerp to Portland.

58. Give what you consider the necessary supplies for such a voyage.

59. Give what you consider a proper crew.

60. Give the ratings of the crew and their duties.

61. Do you know how much time was expended, if any, in re-caulking the main deck of the Babin Chevaye preparatory to this voyage?

62. Do you know how many men were employed?

63. Do you know how long a time they were employed?

64. Do you know how much material was used?

65. Will you procure, if it has not already been attended to, from the owners of the Babin Chevaye, or

their agents, the itemized statement and bills for material and labor expended in re-caulking the main deck of the Babin Chevaye preparatory to this voyage?

66. Were the decks of the Babin Chevaye completely overhauled and re-caulked preparatory to this voyage?

67. Do you know or can you produce any record showing when the Babin Chevaye was last completely overhauled and her main deck entirely re-caulked prior to this voyage commencing February, 1909?

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.
W. WILSON and JOHN M. QUAILE, part-
ners as MEYER, WILSON and COMPANY,
Libellants,

vs.

THE BARK "BABIN CHEVAYE,"
Defendant,
BUREAU FRERES & BAILLERGEAU,
Claimant.

DEPOSITION OF WITNESS PRODUCED,
SWORN AND EXAMINED THE SIXTH DAY
OF SEPTEMBER A. D., ONE THOUSAND NINE
HUNDRED AND ELEVEN, AT THE AMERI-
CAN CONSULATE GENERAL AT ANTWERP,
BELGIUM, UNDER AND BY VIRTUE OF A
COMMISSION ISSUED OUT OF THE DIS-
TRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON, IN A CER-

TAIN CAUSE THEREIN DEPENDING AND AT ISSUE BETWEEN GEORGE H. C. MEYER, H. L. E. MEYER, JR., J. W. WILSON AND JOHN M. QUAILE, PARTNERS AS MEYER, WILSON AND COMPANY, LIBELLANTS, AND THE BARK "BABIN CHEVAYE," DEFENDANT, AND BUREAU & BAILLERGEAU, CLAIMANT, AS FOLLOWS:

R. R. BAINES, AGED 65 YEARS AND UPWARDS, RESIDING AT ANTWERP, BELGIUM, BEING DULY AND PUBLICLY SWORN PURSUANT TO THE DIRECTIONS HERETO ANNEXED, AND EXAMINED ON THE PART OF THE DEFENDANT AND CLAIMANT, DOTH DEPOSE AND SAY AS FOLLOWS:

FIRST—TO THE FIRST INTERROGATORY HE SAITH:

R. R. BAINES, 65 years of age, Antwerp, Marine Surveyor.

SECOND—TO THE SECOND INTERROGATORY HE SAITH:

Ten years, Antwerp.

HARRY TUCK SHERMAN,
Commissioner.

THIRD—TO THE THIRD INTERROGATORY HE SAITH:

Five years as sailor, 4 years as certificated officer in sailing ships on foreign voyages, 4 years as officer in steamers and 22 years as Master in steamers in foreign and general trades.

FOURTH—TO THE FOURTH INTERROGA-

ORY HE SAITH:

Yes, by experience, having for many years been engaged very frequently in superintending the loading of such and other ships, and in this way and with my general experience I am well acquainted with such stowage.

FIFTH—TO THE FIFTH INTERROGATORY
HE SAITH:

French built vessels generally have much more space covered in above the main deck and more massively constructed than in British built vessels and their iron work is as a rule heavier than that of the latter. Some have a continuous upper or spar deck from stem to stern, others long poops and forecastles and carry their boats and spare spars above these superstructures, whereas the British built vessels generally carry their spars on the main deck.

SIXTH—TO THE SIXTH INTERROGATORY
HE SAITH:

A vessel with a lot of superstructural weight say 60 tons would require considerably less weight on her tween decks as compared to one with less top-weight. Perhaps 100 tons less on tween decks.

SEVENTH—TO THE SEVENTH INTERROGATORY
HE SAITH:

No rule.

EIGHTH—TO THE EIGHTH INTERROGATORY
HE SAITH:

No. rule.

NINTH—TO THE NINTH INTERROGATORY
HE SAITH:

The amount of weight to be carried on tween decks

varies according to her structure, stiffness when

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Commissioner.

without cargo, the nature of the cargo to be carried and whether she is full built or with fine ends.

TENTH—TO THE TENTH INTERROGATORY

HE SAITH:

I remember her loading in Antwerp and taking stiffening on board on the 5th, January 1909.

ELEVENTH—TO THE ELEVENTH INTER-

ROGATORY HE SAITH:

Yes, I superintended the stowage.

TWELFTH—TO THE TWELFTH INTERROG-

ATORY HE SAITH:

By daily visits to the ship's hold.

THIRTEENTH—TO THE THIRTEENTH IN-

TERROGATORY HE SAITH:

Mr. Meeuwissen has record of the details. I believe there was somewhere about 2030 tons stowed in the lower hold.

FOURTEENTH—TO THE FOURTEENTH IN-

TERROGATORY HE SAITH:

I believe there was somewhere about 954 tons stowed on the tween deck; Mr. Meeuwissen can give the details.

FIFTEEN—TO THE FIFTEENTH INTERROG-

ATORY HE SAITH:

She was stowed by a good firm of stevedores and new dry wood was used. It came along in Winter weather, when mist, fog and snow fell and also some fine days. The iron would attract all the moisture of the atmosphere and soon lose its blue appearance.

SIXTEENTH—TO THE SIXTEENTH INTERROGATORY HE SAITH:

Yes. The iron rods for stiffening came by rail and the snow had to be cleared from them to sling them and also wet, misty weather was prevalent; some iron plates had the snow swept off them prior to being taken on board. Some fine weather also came along, some iron girders were stacked on open quay and loaded from there. It was Winter weather.

SEVENTEENTH—TO THE SEVENTEENTH INTERROGATORY HE SAITH:

The usual condition of new iron when subjected to
HARRY TUCK SHERMAN,

Commissioner.

snow and rain since leaving the Factory or Works.

EIGHTEENTH—TO THE EIGHTEENTH INTERROGATORY HE SAITH:

Inclement weather and the nature of the metal.

NINETEENTH—TO THE NINETEENTH INTERROGATORY HE SAITH:

Variable weather, snow, fog, misty Winter weather. My records say; 4th January fog, 6th, fine dull; 7th, dry; 8th, dull, damp; 9th, fine dry, 10th, fine, 25th, fine, frost, 27th, Jan., fine, 29th, fine light frost, 30th, snow and sunshine. February 1st fine snow on ground, 2nd fine, 3rd rain, 4th fine, 5th S. W. drizzle, 6th fine. February 10th fine dull, 11th fine dry, 12th, frost, 13th frost, 14th, fine dry dull, 15th, dull damp.

TWENTIETH—TO THE TWENTIETH INTERROGATORY HE SAITH:

I went down her hold, gave instructions to the Captain to have her hold swept clean of nitrate, to have her bilges baled out dry and plenty new dry dunnage on board ready for the stiffening and recommended to stop the beginning of the stiffening and clean more extensively, which was done, men working extra hours for that purpose and then using plenty dry sawdust over the wooden flooring. This was well done. I also at various times when in the hold looked round for evidences of leakage by the decks or for anything out of order.

TWENTY-FIRST—TO THE TWENTY-FIRST
INTERROGATORY HE SAITH:

I found her decks tight from below and on deck I was on the look out for any suspicious places or signs but found her caulking good, the decks generally in good condition.

TWENTY-SECOND—TO THE TWENTY-SECOND
INTERROGATORY HE SAITH:

I found nothing wrong with stanchions and no rivets in them deficient.

TWENTY-THIRD—TO THE TWENTY-THIRD
INTERROGATORY HE SAITH:

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Commissioner.

She was in good condition and appeared to be thoroughly seaworthy.

TWENTY-FOURTH — TO THE TWENTY-FOURTH
INTERROGATORY HE SAITH:

An association for the classification of sea going vessels and other purposes.

TWENTY-FIFTH—TO THE TWENTY-FIFTH INTERROGATORY HE SAITH:

The Bureau Veritas have their own Surveyors and their own Rules and see that the vessels classed by them are maintained in good and seaworthy condition.

TWENTY-SIXTH—TO THE TWENTY-SIXTH INTERROGATORY HE SAITH:

Gustave Lauwers, inspector and E. Garnuchot, expert.

TWENTY-SEVENTH — TO THE TWENTY SEVENTH INTERROGATORY HE SAITH:

I am unaware of what examination the B. V. surveyor made.

TWENTY-EIGHTH — TO THE TWENTY-EIGHTH INTERROGATORY HE SAITH:

The owners or Master or ship repairers know this, I do not.

TWENTY-NINTH—TO THE TWENTY-NINTH INTERROGATORY HE SAITH:

Under the Main deck.

THIRTIETH—TO THE THIRTIETH INTERROGATORY HE SAITH:

No.

THIRTY-FIRST—TO THE THIRTY-FIRST INTERROGATORY HE SAITH:

This question is already answered The answer is:—No, unless the main deck leaked.

THIRTY-SECOND — TO THE THIRTY-SECOND INTERROGATORY HE SAITH:

Yes.

THIRTY-THIRD—TO THE THIRTY-THIRD
INTERROGATORY HE SAITH:

Yes. In the trades an excellent opportunity to caulk this or any other deck is availed of and as a rule is only done when the weather is fine. It is quite

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customary in all vessels to caulk wooden decks at sea.

THIRTY-FOURTH — TO THE THIRTY-
FOURTH INTERROGATORY HE SAITH:

As far as I could see, the vessel was in every way equipped for the voyage, but this was not in my province.

THIRTY-FIFTH—TO THE THIRTY-FIFTH
INTERROGATORY HE SAITH:

The Captain and owners would no doubt be in accordance with French laws appertaining to shipping.

THIRTY-SIXTH—TO THE THIRTY-SIXTH
INTERROGATORY HE SAITH:

I do not know.

THIRTY-SEVENTH—TO THE THIRTY-SEV-
ENTH INTERROGATORY HE SAITH:

I objected to using dunnage wood that had been used for nitrate and had new dry wood supplied and used plenty of it in case the iron stiffening which consisted of long bundles of bars about 3-16" or 1-4" diameter should turn out unsatisfactorily, and as the ship had web frames every 24' or so, the iron could not touch the sides of the vessel, but was supported

between these frames and spaces by stout, dry wood and afterwards some pig iron was put in here and there also to support it in case the wood ceded.

Rail cargoes—complete—laden and secured as per my instructions under my supervision have arrived round the Capes without giving any bother during the voyage and the ships have been comfortable.

CROSS INTERROGATORIES.

FIRST—TO THE FIRST CROSS-INTERROGATORY HE SAITH:

French built vessels generally have much more space covered in above the main deck and more massively constructed than in British built vessels and their iron work is as a rule heavier than that of the latter. Some have a continuous upper and spar deck

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from stem to stern, others long poops and forecastles and carry their boats and spare spars above these superstructures, whereas the British built vessels generally carry their spars on the main deck. A vessel with a lot of superstructural weight of say 60 tons would require considerably less weight on her tween decks as compared to one with less topweight, perhaps 100 tons less on the tween decks. The amount of weight to be carried on the tween decks of a sailing vessel varies according to her structure, stiffness when without ballast or cargo, the nature of the cargo to be carried, whether she is full built or with fine ends, and also to the nature of her rigging &c as to whether she is what is termed “lofty” rigged, or “snugly” rigged and sparred.

SECOND—TO THE SECOND CROSS-INTERROGATORY HE SAITH:

There is no rule. Experience of the vessel's behavior at sea would form a basis for future guidance.

THIRD—TO THE THIRD CROSS-INTERROGATORY HE SAITH:

It is impossible to say without knowing the nature of the respective cargoes.

FOURTH—TO THE FOURTH CROSS-INTERROGATORY HE SAITH:

It is impossible to say without knowing the nature of the respective cargoes.

FIFTH—TO THE FIFTH CROSS-INTERROGATORY HE SAITH:

It is impossible to say without knowing the nature of the respective cargoes.

SIXTH—TO THE SIXTH CROSS-INTERROGATORY HE SAITH:

It is impossible to say without knowing the nature of the respective cargoes.

SEVENTH—TO THE SEVENTH CROSS INTERROGATORY HE SAITH:

It is impossible to say without knowing the nature

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of the respective cargoes.

EIGHTH—TO THE EIGHTH CROSS-INTERROGATORY HE SAITH:

It is impossible to say without knowing the nature of the respective cargoes.

NINTH—TO THE NINTH CROSS-INTERROG-

ATORY HE SAITH:

It is impossible to say without knowing the nature of the respective cargoes.

TENTH—TO THE TENTH CROSS-INTERROGATORY HE SAITH:

It is impossible to say without knowing the nature of the respective cargoes.

ELEVENTH—TO THE ELEVENTH CROSS-INTERROGATORY HE SAITH:

There is no rule, see answer to question No. 2.

TWELFTH—TO THE TWELFTH CROSS-INTERROGATORY HE SAITH:

No, I was not present on all occasions and all hours, but I inspected the loading from time to time. Several days during drydocking, waiting for berth and or cargo she did not receive any cargo.

THIRTEENTH — TO THE THIRTEENTH CROSS-INTERROGATORY HE SAITH:

I kept no records of when the Master came into the hold.

FOURTEENTH — TO THE FOURTEENTH CROSS-INTERROGATORY HE SAITH:

The iron in a general way seemed to have recently come from the mills and being wet with mist and snow most likely had never been in contact with salt water.

FIFTEENTH—TO THE FIFTEENTH CROSS-INTERROGATORY HE SAITH:

It appeared to me that it was more likely to become rusty than actually rusty.

SIXTEENTH—TO THE SIXTEENTH CROSS-

INTERROGATORY HE SAITH:

See my reply to question No. 14.

SEVENTEENTH—TO THE SEVENTEENTH
CROSS-INTERROGATORY HE SAITH:

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Commissioner.

Some came direct from railway waggons to the vessel's hold, some was unladen on the quay and lay in the open till convenient to ship, or for other purposes.

EIGHTEENTH — TO THE EIGHTEENTH
CROSS-INTERROGATORY HE SAITH:

I do not know.

NINETEENTH — TO THE NINETEENTH
CROSS-INTERROGATORY HE SAITH:

Nil.

TWENTIETH—TO THE TWENTIETH CROSS-
INTERROGATORY HE SAITH:

When authorized I went and inspected her holds on 29th December and found she was not ready to receive stiffening and required sweeping.

4th January saw her again and told them to sweep again and use sawdust and began loading iron 5th January, 1909.

TWENTY-FIRST—TO THE TWENTY-FIRST
CROSS-INTERROGATORY HE SAITH:

When the vessel was loaded and finished on February 15th and sailed 16th via Cherbourg.

TWENTY-SECOND—TO THE TWENTY-SECOND
CROSS-INTERROGATORY HE SAITH:

Whenever about the vessel I looked for faults, but

cannot state the number of hours.

TWENTY-THIRD—TO THE TWENTY-THIRD
CROSS-INTERROGATORY HE SAITH:

I looked at them.

TWENTY-FOURTH — TO THE TWENTY-
FOURTH CROSS-INTERROGATORY HE
SAITH:

I have no note of this and do not remember.

TWENTY-FIFTH—TO THE TWENTY-FIFTH
CROSS-INTERROGATORY HE SAITH:

I do not remember.

TWENTY-SIXTH—TO THE TWENTY-SIXTH
CROSS-INTERROGATORY HE SAITH:

Same as to question No. 25. I always look at stanchions and their rivets especially in the way of No. 2 hatchway and look for faults in the ladder stanchions

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Commissioner.

before attempting to use them in going down the hold.

TWENTY-SEVENTH — TO THE TWENTY-
SEVENTH CROSS-INTERROGATORY HE
SAITH:

Whenever and wherever the main deck was clear, I would look at the seaming and if any place looked suspicious would try it with my knife, and where covered with crew's quarters would get inside and see whether the seams were well filled.

TWENTY-EIGHTH — TO THE TWENTY-
EIGHTH CROSS-INTERROGATORY HE
SAITH:

The previous captain who was succeeded by Lebeaupin.

TWENTY-NINTH—TO THE TWENTY-NINTH CROSS-INTERROGATORY HE SAITH:

To ascertain whether the vessel's hold was ready and fit to commence taking in her stiffening and to report to the Captain the result of my examination.

THIRTIETH—TO THE THIRTIETH CROSS-INTERROGATORY HE SAITH:

I do not know.

THIRTY-FIRST — TO THE THIRTY-FIRST CROSS-INTERROGATORY HE SAITH:

I do not know.

THIRTY-SECOND — TO THE THIRTY-SECOND CROSS-INTERROGATORY HE SAITH:

No, I simply saw him there.

THIRTY-THIRD—TO THE THIRTY-THIRD CROSS-INTERROGATORY HE SAITH:

I did not interest myself in his inspection.

THIRTY-FOURTH — TO THE THIRTY-FOURTH CROSS-INTERROGATORY HE SAITH:

The main deck, see my reply to question No. 27.

THIRTY-FIFTH—TO THE THIRTY-FIFTH CROSS-INTERROGATORY HE SAITH:

See my reply to question No. 27.

THIRTY-SIXTH—TO THE THIRTY-SIXTH CROSS-INTERROGATORY HE SAITH:

I cannot say; presumably all.

THIRTY-SEVENTH—TO THE THIRTY-SEVENTH CROSS-INTERROGATORY HE

SAITH:

I cannot say.

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Commissioner.

THIRTY-EIGHTH — TO THE THIRTY-EIGHTH CROSS-INTERROGATORY HE SAITH:

My examination was made more particularly in order to be conscientiously enabled to certify that her caulking was good and her decks tight for the intended voyage. I was instructed in order to make sure that the vessel was thoroughly seaworthy before her voyage as to stowage of cargo.

The B. V. Surveyor can reply for himself. I believe he would be interested as to whether she was entitled to retain her character in the B. V. books.

THIRTY-NINTH—TO THE THIRTY-NINTH CROSS-INTERROGATORY HE SAITH:

No financial interest or any interest besides seeing her as per my intended report and that she may make a safe voyage and be comfortably laden.

FOURTIETH—TO THE FOURTIETH CROSS-INTERROGATORY HE SAITH:

Generally the Captain, sometimes the owners.

FOURTY-FIRST — TO THE FORTY-FIRST CROSS-INTERROGATORY HE SAITH:

The Captain, who followed the Captain who arrived home with the vessel.

FORTY-SECOND—TO THE FORTY-SECOND CROSS-INTERROGATORY HE SAITH:

The Captain paid me the fee of 90—, when I hand-

ed him the Certificate of stowage and condition of ship, after completion of the loading. His predecessor engaged me.

FORTY-THIRD — TO THE FORTY-THIRD CROSS-INTERROGATORY HE SAITH:

I have no records of repairs or renewals. If any, the owner would know.

FORTY-FOURTH—TO THE FORTY-FOURTH CROSS-INTERROGATORY HE SAITH:

I refer to my sketch which I hand in marked (Exhibit C).

The poop deck is the deck marked A.

The main deck is the deck marked B.

Any leakage through A, would interfere with the comfort of the Captain and officers, and damage sails and stores. The deck B. under the poop deck being

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not exposed to the weather maintains the caulking much longer than the deck where no superstructure exists.

FORTY-FIFTH — TO THE FORTY-FIFTH CROSS-INTERROGATORY HE SAITH:

To shelter the Captain and officers and their cabins and bedding, their dining room and saloon; also to shelter the sail repairing and storing room, some of the stores, and to afford surplus buoyancy, to make the ship less liable to pooping seas, and to afford a commanding position for maneuvering the vessel. Also to count for bounty purposes. The poops of British built vessels are generally proportionally much less than in French built vessels.

FORTY-SIXTH — TO THE FORTY-SIXTH
CROSS-INTERROGATORY HE SAITH:

Certainly.

FORTY-SEVENTH — TO THE FORTY-SEV-
ENTH CROSS-INTERROGATORY HE
SAITH:

— — — — —

FORTY-EIGHTH—TO THE FORTY-EIGHTH
CROSS-INTERROGATORY HE SAITH:

— — — — —

FORTY-NINTH — TO THE FORTY-NINTH
CROSS-INTERROGATORY HE SAITH:

— — — — —

FIFTIETH—TO THE FIFTIETH CROSS-IN-
TERROGATORY HE SAITH:

Quite customary in sailors and steamers to caulk any parts of any deck, which after passing through stormy latitudes may show that it is necessary or advisable so to do.

The caulking done at sea is generally well done by the ship's carpenter and in fine weather only and better done than when in port when contracts cause the work to be hurried.

FIFTY-FIRST—TO THE FIFTY FIRST CROSS-
INTERROGATORY HE SAITH:

Yes.

FIFTY-SECOND — TO THE FIFTY-SECOND
CROSS-INTERROGATORY HE SAITH:

Seldom is a voyage made but a supply of necessary stores is shipped for the purpose and used in the fine weather of the voyage. It is a general custom.

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Commissioner.

FIFTY-THIRD — TO THE FIFTY-THIRD
CROSS-INTERROGATORY HE SAITH:

They have their crew and must keep them employed profitably and avail themselves of fine weather to keep ship in repair. Same may be said of repairing sails and of course they make what economies they can and get better results.

FIFTY-FOURTH—TO THE FIFTY-FOURTH
CROSS-INTERROGATORY HE SAITH:

— — — — —

FIFTY-FIFTH—TO THE FIFTY-FIFTH CROSS
INTERROGATORY HE SAITH:

Captain and owners know these facts. I do not.

FIFTY-SIXTH—TO THE FIFTY-SIXTH CROSS
INTERROGATORY HE SAITH:

I do not know.

FIFTY-SEVENTH—TO THE FIFTY-SEVENTH
CROSS-INTERROGATORY HE SAITH:

I have never considered this matter and suggest that the owners and Captain are best judges from their experience of other similar vessels.

FIFTY-EIGHTH—TO THE FIFTY-EIGHTH
CROSS-INTERROGATORY HE SAITH:

Purely an owners question.

FIFTY-NINTH — TO THE FIFTY-NINTH
CROSS-INTERROGATORY HE SAITH:

My reply is the same as to question No. 58.

SIXTIETH—TO THE SIXTIETH CROSS-INTERROGATORY HE SAITH:

My reply is the same as to question No. 58.

SIXTY-FIRST—TO THE SIXTY-FIRST CROSS

INTERROGATORY HE SAITH:

No.

SIXTY-SECOND—TO THE SIXTY-SECOND
CROSS-INTERROGATORY HE SAITH:

No.

SIXTY-THIRD — TO THE SIXTY-THIRD
CROSS-INTERROGATORY HE SAITH:

No.

SIXTY-FOURTH—TO THE SIXTY-FOURTH
CROSS-INTERROGATORY HE SAITH:

No.

HARRY TUCK SHERMAN,

Commissioner.

SIXTY-FIFTH—TO THE SIXTY-FIFTH CROSS
INTERROGATORY HE SAITH:

This is not my province.

SIXTY-SIXTH—TO THE SIXTY-SIXTH CROSS
INTERROGATORY HE SAITH:

Not to my knowledge.

SIXTY-SEVENTH — TO THE SIXTY-SEV-
ENTH CROSS-INTERROGATORY HE
SAITH:

I do not know.

R. R. BAINES,

KINGDOM OF BELGIUM,

PROVINCE OF ANTWERP,

AMERICAN CONSULATE GENERAL—ss.

THIS IS TO CERTIFY THAT I, HARRY
TUCK SHERMAN VICE CONSUL GENERAL
OF THE UNITED STATES OF AMERICA, IN
THE CITY OF ANTWERP, KINGDOM OF BEL-

GIUM BY VIRTUE OF THE FOREGOING COMMISSION TO BE DIRECTER, CAUSED TO ABOVE NAMED R. R. BAINES, APPEARING FOR THE DEFENDANT THEREIN MENTIONED, TO COME BEFORE ME IN THE UNITED STATES CONSULATE GENERAL IN SAID PROVINCE OF ANTWERP ON THE SIXTH DAY OF SEPTEMBER, A. D., 1911, AND THAT THE FOREGOING DEPOSITION SUBSCRIBED BY SAID DEPONENT WAS TAKEN BEFORE ME AT, THE UNITED STATES CONSULATE GENERAL, IN SAID PROVINCE OF ANTWERP, ON THE DATE LAST NAMED, BETWEEN THE HOURS OF TEN O'CLOCK A. M. AND SIX O'CLOCK P. M. ON SAID DAY, AND THE SAME WAS BY ME REDUCED TO WRITING. THAT BEFORE PROCEEDING TO THE EXAMINATION THAT SAID DEPONENT WAS BY ME DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, IN ANSWER TO THE SEVERAL INTERROGATORIES AND CROSS-INTERROGATORIES ANNEXED, AND THEREUPON HE MADE AND GAVE THE FOREGOING ANSWERS. THAT THE SAID DEPOSITION WHEN COMPLETED WAS BY ME READ TO SAID DEPONENT, AND THE SAME WAS THEREUPON BY HIM IN MY PRESENCE SUBSCRIBED.

HARRY TUCK SHERMAN,

Commissioner.

IN TESTIMONY WHEREOF I HEREUNTO
SET MY HAND AND THE SEAL OF THE SAID
CONSULATE GENERAL OF THE UNITED
STATES OF AMERICA, THIS SIXTH DAY OF
SEPTEMBER, 1911.

HARRY TUCK SHERMAN,
AMERICAN VICE CONSUL GENERAL,
COMMISSIONER.

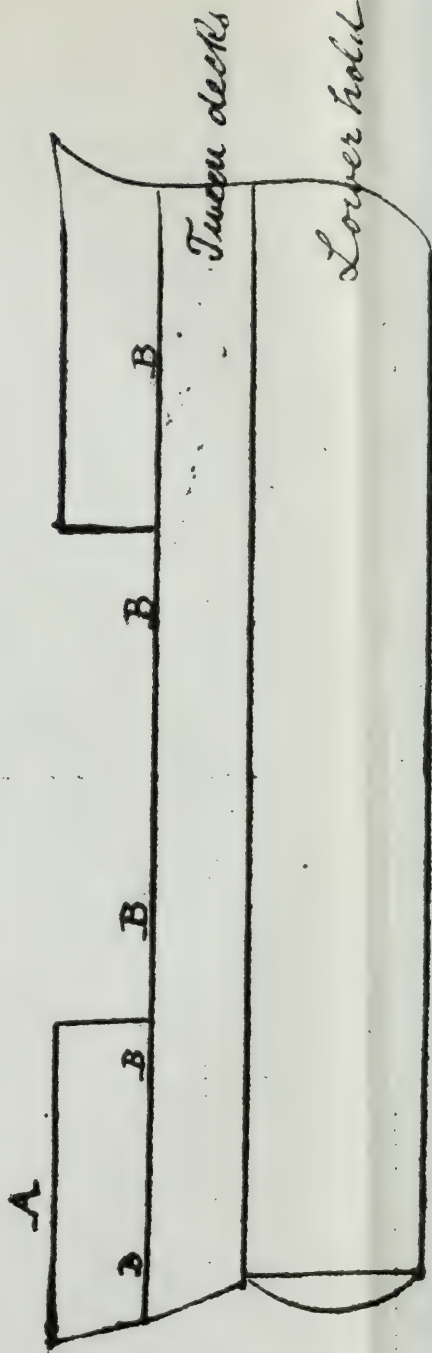
Filed Apr. 9, 1912.

A. M. CANNON,
Clerk U. S. District Court.

M. R. Baizer. Manager of the
Caribbean

Dubin Cheyney

Exhibit C.



Handwritten text, possibly a title or header, partially obscured by a large scribble.

Experiment 10

D. 10



DIRECT INTERROGATORIES TO BE PRO-
FOUNDED TO THE WITNESS, E.

MEEUWISSEN.

1. State your name, age, residence and occupation.

2. How long has your occupation been as above stated?

3. What experience have you had in the stowage of vessels?

4. Are you familitr with the French Bark Babin Chevaye?

5. Do you remember the loading of the said vessel prior to her voyage from Antwerp to Portland, which voyage began on the 16th of February, 1909?

6. Did you have any duties in connection with the loading of the said vessel at that time?

7. What were those duties?

8. Have you prepared a sketch showing the distribution of the cargo of the said vessel?

9. If the witness answer the last question in the affirmative, then let him state when such sketch was prepared and from what data.

10. If the witness has answered Interrogatory 8 in the affirmative, then let him annex the sketch referred to, to his deposition and mark the same Exhibit "A".

11. State what portion of the cargo was loaded in the lower hold and the weight of each portion so loaded.

12. State what portion of the cargo was loaded in the between decks and the weight of each portion so loaded.

13. What was done to hold the cargo in place and to protect it from damage because of the rolling of the vessel?

14. State your opinion of the stowage of the vessel, as to whether it was a proper and careful case of stowage.

15. Under what deck was the cargo stowed?

16. Was any portion thereof stowed under the poop deck?

17. If the main deck was tight and staunch could leakage in the poop deck have damaged the cargo of the Babin Chevaye on the voyage aforesaid?

18. In the light of your experience, what is your opinion with reference to the distribution of the cargo of the Babin Chevaye between the lower hold and the between decks?

19. Did you make any record from day to day while the cargo of the Babin Chevaye was stowed prior to her voyage beginning February 16, 1909?

20. If the witness answer the last question in the affirmative, then let him produce such record before the officer taking this deposition and let him annex a true transcript and copy thereof to the deposition and mark the same "**Exhibit B.**"

21. If the witness has produced such record and made a copy thereof, as requested, then let him say in whose possession the said record has been since February, 1909.

22. What was the condition of the plate iron loaded on the Babin Chevaye at the time when it was received by the ship for carriage?

23. What was the condition of the weather when

the said iron was so received for carriage?

24. What, if any, experience have you had as a sea-faring man?

25. What work was done on the Babin Chevaye at Antwerp, with a view to preparing her for her voyage beginning February 16, 1909?

26. What was the condition of the main deck of the vessel as to being tight at the inception of said voyage?

27. What, if anything, was done in the way of inspection and examination of the vessel with reference to her seaworthiness prior to the inception of the said voyage?

28. What was the condition of the vessel as to weather? Was she staunch, strong and seaworthy at the inception of said voyage?

29. Let the witness state any circumstance which serves to fix in his memory the facts to which he has testified as above.

30. State any other fact within your knowledge material to the issues involved in this case.

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.

W. WILSON and JOHN M. QUAILE, part-
ners as MEYER, WILSON and COMPANY,

Libellants,

vs.

THE FRENCH BARK "BABIN CHEVAYE,"

Defendant,

BUREAU FRERES & BAILLERGEAU,

Claimant.

CROSS INTERROGATORIES TO BE PRO-
POUNDED TO THE WITNESS, E.

MEEUWISSEN.

1. If you annex a stowage plan to your deposition, state when you made such stowage plan.

2. State from what data or information you made the stowage plan or whether you made it from memory.

3. If you state you made the stowage plan from data, attach the original data to your deposition.

4. State whether the information on which you base your knowledge of the stowage of the cargo of the *Babin Chevaye* is your own personal knowledge.

5. State whether you were present during the entire time of the stowage of the *Babin Chevaye*.

6. If not present the entire time, state during what time you were present.

7. State how you know the weight of the different portions of the cargo.

8. State if you weighed the cargo yourself.

9. State whether you know of your own personal knowledge all that was done to hold the cargo in place and keep it from shifting or moving.

10. If you so know, then state particularly what was done, giving the dimensions of shifting boards, if any were used, braces, blocks and chocks.

11. Give the full details of everything that was done as to strength and dimensions of material and how fastened.

12. Question 14 is objected to as incompetent, irrelevant and immaterial.

13. Are you interested in the Babin Chevaye, directly or indirectly?

14. Are you in the employ, directly or indirectly, of the owners of the Babin Chevaye?

15. Do you, directly or indirectly, get any part of your pay or wages or yearly income from the owners of the Babin Chevaye?

16. Question 17 is objected to as calling for a conclusion and incompetent.

17. Question 18 is objected to as calling for a conclusion, incompetent, irrelevant and immaterial.

18. If you say that the plate-iron loaded on the Babin Chevaye was rusty, state whether it was fresh water rust, or salt water rust, whether it was deep corrosion or only a surface powder.

19. State what its color was. Was it light red, yellowish red, brick red, brown or metallic?

20. Do you know of your own personal knowledge what work was done on the Babin Chevaye at Antwerp with a view to preparing her for her voyage, as asked you in Question 25 of the direct interrogatories?

21. If you know of your own personal knowledge state how you know it.

22. Were you present during the entire time?

23. State how long the weather was rainy or snowy when the iron was being received, if it was rainy or snowy.

24. Question 26 is objected to on the ground that it is a conclusion, incompetent, irrelevant and immaterial.

25. If you state in your testimony that anything was done to any deck of the vessel, state what was done and what deck, and state on what portion of what deck the work was done.

26. If you say any caulking was done on the main deck state how much of the main deck and what part of it.

27. How many men were employed on the caulking and for how long a time?

28. Did you try the seams on the main deck yourself?

29. State how you tried them—with what instrument and by what method—and whether you went all over the deck.

30. Question 28 is objected to as a conclusion, incompetent, irrelevant and immaterial.

31. Do you know how much time was expended, if any, in re-caulking the main deck of the Babin Chevaye preparatory to this voyage?

32. Do you know how many men were employed?

33. Do you know how long a time they were employed?

34. Do you know how much material was used?

35. Will you procure, if it has not already been attended to, from the owners of the Babin Chevaye, or their agents, the itemized statement and bills for material and labor expended in re-caulking the main deck of the Babin Chevaye preparatory to this voyage?

36. Were the decks of the Babin Chevaye completely overhauled and re-caulked preparatory to this voyage?

37. Do you know or can you produce any record showing when the Babin Chevaye was last completely overhauled and her main deck entirely re-caulked prior to this voyage commencing February, 1909?

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.
W. WILSON and JOHN M. QUAILE, part-
ners as MEYER, WILSON and COMPANY,
Libellants,

vs.

THE BARK "BABIN CHEVAYE,"
Defendant,
BUREAU FRERES & BAILLERGEAU,
Claimant.

DEPOSITION OF WITNESS PRODUCED,
SWORN AND EXAMINED THE SIXTH OF
SEPTEMBER, A. D., ONE THOUSAND NINE
HUNDRED AND ELEVEN AT THE AMERI-
CAN CONSULATE GENERAL AT ANTWERP,
BELGIUM, UNDER AND BY VIRTUE OF A
COMMISSION ISSUED OUT OF THE DIS-
TRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF OREGON, IN A CERTAIN
CAUSE THEREIN DEPENDING AND AT IS-
SUE BETWEEN GEORGE H. C. MEYER, H. L.
E. MEYER, JR., J. W. WILSON AND JOHN M.
QUAILE, PARTNERS AS MEYER, WILSON
AND COMPANY, LIBELLANTS, AND THE
BARK "BABIN CHEVAYE," DEFENDANT,
AND BUREAU FRERES & BAILLERGEAU,

CLAIMANT, AS FOLLOWS:

EUGENE FRANCOIS MEEUWISSEN, AGED 30 YEARS AND UPWARDS, RESIDING AT ANTWERP, BELGIUM, BEING DULY AND PUBLICLY SWORN PURSUANT TO THE DIRECTIONS HERETO ANNEXED, AND EXAMINED ON THE PART OF THE DEFENDANT AND CLAIMANT, BOTH DEPOSE AND SAY AS FOLLOWS:

FIRST—TO THE FIRST INTERROGATORY HE SAITH:

EUGENE FRANCOIS MEEUWISSEN, 30 years of age, Antwerp 22, Groote Pieter Pot Street. Checker.

HARRY TUCK SHERMAN,

Commissioner.

SECOND—TO THE SECOND INTERROGATORY HE SAITH:

Since my 18th year.

THIRD—TO THE THIRD INTERROGATORY HE SAITH:

About none.

FOURTH—TO THE FOURTH INTERROGATORY HE SAITH:

Yes, having worked on board as a tallyman for about 20 days.

FIFTH—TO THE FIFTH INTERROGATORY HE SAITH:

Yes.

SIXTH—TO THE SIXTH INTERROGATORY HE SAITH:

Yes.

SEVENTH—TO THE SEVENTH INTERROGATORY HE SAITH:

Tallying in, noting condition—see where the goods were stowed, to make up stowage plan.

EIGHTH—TO THE EIGHTH INTERROGATORY HE SAITH:

Yes.

NINTH—TO THE NINTH INTERROGATORY HE SAITH:

The definite stowage plan, which was handed to Mate and to the stevedore was drawn up on the 15th February; I was making it up since the 9th.

Data: All the notes taken by myself.

TENTH—TO THE TENTH INTERROGATORY HE SAITH:

Copy of stowage plan herewith. Marked Exhibit A.

ELEVENTH—TO THE ELEVENTH INTERROGATORY HE SAITH:

About 2030 tons were loaded in the lower hold. For details see plan.

TWELFTH—TO THE TWELFTH INTERROGATORY HE SAITH:

960,590 Kos loaded in the tween decks. For details see plan.

HARRY TUCK SHERMAN,

Commissioner.

tails see plan.

THIRTEENTH—TO THE THIRTEENTH INTERROGATORY HE SAITH:

I do not know.

FOURTEENTH—TO THE FOURTEENTH IN-

TERROGATORY HE SAITH:

I have not enough experience to answer.

FIFTEENTH—TO THE FIFTEENTH INTERROGATORY HE SAITH:

As per stowage plan.

SIXTEENTH—TO THE SIXTEENTH INTERROGATORY HE SAITH:

No.

SEVENTEENTH—TO THE SEVENTEENTH INTERROGATORY HE SAITH:

I. do not know.

EIGHTEENTH—TO THE EIGHTEENTH INTERROGATORY HE SAITH:

I do not know. I have not sufficient experience to offer any technical opinion.

NINETEENTH—TO THE NINETEENTH INTERROGATORY HE SAITH:

Yes, day by day.

TWENTIETH—TO THE TWENTIETH INTERROGATORY HE SAITH:

See tally book herewith. (Marked Exhibit B.)

TWENTY-FIRST—TO THE TWENTY-FIRST INTERROGATORY HE SAITH:

This record has been in my possession all the time since February, 1909.

TWENTY-SECOND—TO THE TWENTY-SECOND INTERROGATORY HE SAITH:

The plates arrived in open waggons, without being covered. They were more or less rusty, it was in Winter time and it was snowing.

TWENTY-THIRD—TO THE TWENTY-THIRD INTERROGATORY HE SAITH:

Varying, cold, snow and dry.

HARRY TUCK SHERMAN,

Commissioner.

TWENTY-FOURTH—TO THE TWENTY-FOURTH INTERROGATORY HE SAITH:

None.

TWENTY-FIFTH—TO THE TWENTY-FIFTH INTERROGATORY HE SAITH:

I had nothing to do with these matters and they are not within my knowledge.

TWENTY-SIXTH—TO THE TWENTY-SIXTH INTERROGATORY HE SAITH:

I had nothing to do with these matters and they are not within my knowledge.

TWENTY-SEVENTH — TO THE TWENTY-SEVENTH INTERROGATORY HE SAITH:

I had nothing to do with these matters and they are not within my knowledge.

TWENTY-EIGHTH — TO THE TWENTY-EIGHTH INTERROGATORY HE SAITH:

I had nothing to do with these matters and they are not within my knowledge.

TWENTY-NINTH—TO THE TWENTY-NINTH INTERROGATORY HE SAITH:

By my presence all the time of the loading. My tallies.

THIRTIETH—TO THE THIRTIETH INTERROGATORY HE SAITH:

I have nothing more to say.

CROSS INTERROGATORIES.

FIRST—TO THE FIRST CROSS-INTERROGA-

TORY HE SAITH:

I annex copy of the stowage plan, which was made up by me during the time I was checking the cargo per this vessel.

SECOND—TO THE SECOND CROSS-INTERROGATORY HE SAITH:

From daily tallies, not from memory.

THIRD—TO THE THIRD CROSS-INTERROGATORY HE SAITH:

I have given true copy of Original, which I keep in my possession. I have made the stowage plan from the notes in my book of which I handed in a

HARRY TUCK SHERMAN,

Commissioner.

copy marked (Exhibit B.)

FOURTH—TO THE FOURTH CROSS- INTERROGATORY HE SAITH:

Yes.

FIFTH—TO THE FIFTH CROSS INTERROGATORY HE SAITH:

All the time.

SIXTH—TO THE SIXTH CROSS-INTERROGATORY HE SAITH:

— — — — —

SEVENTH—TO THE SEVENTH CROSS-INTERROGATORY HE SAITH:

I have taken the weights mentioned on the Shipping Permits.

EIGHTH—TO THE EIGHTH CROSS-INTERROGATORY HE SAITH:

No.

NINTH—TO THE NINTH CROSS-INTERROGATORY HE SAITH:

I had nothing to do with these matters and cannot reply.

TENTH—TO THE TENTH CROSS-INTERROGATORY HE SAITH:

I had nothing to do with these matters and cannot reply.

ELEVENTH—TO THE ELEVENTH CROSS-INTERROGATORY HE SAITH:

I had nothing to do with these matters and cannot reply.

TWELFTH—TO THE TWELFTH CROSS-INTERROGATORY HE SAITH:

I had nothing to do with these matters and cannot reply.

THIRTEENTH—TO THE THIRTEENTH CROSS-INTERROGATORY HE SAITH:

Have no interest—was simply employee.

FOURTEENTH—TO THE FOURTEENTH CROSS-INTERROGATORY HE SAITH:

No.

HARRY TUCK SHERMAN,

Commissioner.

FIFTEENTH—TO THE FIFTEENTH CROSS-INTERROGATORY HE SAITH:

No.

SIXTEEN—TO THE SIXTEENTH CROSS-INTERROGATORY HE SAITH:

— — — — —

SEVENTEENTH—TO THE SEVENTEENTH

CROSS-INTERROGATORY HE SAITH:

— — — — —

EIGHTEENTH — TO THE EIGHTEENTH
CROSS-INTERROGATORY HE SAITH:

In my opinion, the rust was caused by snow, not
deep corrosion.

NINETEENTH — TO THE NINETEENTH
CROSS-INTERROGATORY HE SAITH:

Cannot remember.

TWENTIETH—TO THE TWENTIETH CROSS-
INTERROGATORY HE SAITH:

I have no knowledge.

TWENTY-FIRST—TO THE TWENTY-FIRST
CROSS-INTERROGATORY HE SAITH:

I have no knowledge.

TWENTY-SECOND—TO THE TWENTY-SEC-
OND CROSS INTERROGATORY HE SAITH:

Yes.

TWENTY-THIRD—TO THE TWENTY-THIRD
CROSS-INTERROGATORY HE SAITH:

Open trucks, covered with snow.

TWENTY-FOURTH — TO THE TWENTY-
FOURTH CROSS-INTERROGATORY HE
SAITH:

— — — — —

TWENTY-FIFTH—TO THE TWENTY-FIFTH
CROSS-INTERROGATORY HE SAITH:

I have no knowledge on any of these matters.

TWENTY-SIXTH—TO THE TWENTY-SIXTH
CROSS-INTERROGATORY HE SAITH:

I have no knowledge on any of these matters.

TWENTY-SEVENTH — TO THE TWENTY-
SEVENTH CROSS-INTERROGATORY HE
HARRY TUCK SHERMAN,

Commissioner.

SAITH:

I have no knowledge on any of these matters.

TWENTY-EIGHTH — TO THE TWENTY-
EIGHTH CROSS-INTERROGATORY HE
SAITH:

I have no knowledge on any of these matters.

TWENTY-NINTH—TO THE TWENTY-NINTH
CROSS-INTERROGATORY HE SAITH:

I have no knowledge on any of these matters.

THIRTIETH—TO THE THIRTIETH CROSS-
INTERROGATORY HE SAITH:

I have no knowledge on any of these matters.

THIRY-FIRST — TO THE THIRTY-FIRST
CROSS-INTERROGATORY HE SAITH:

I have no knowledge on any of these matters.

THIRTY-SECOND — TO THE THIRTY-SEC-
OND CROSS-INTERROGATORY HE SAITH:

I have no knowledge on any of these matters.

THIRTY-THIRD—TO THE THIRTY-THIRD
CROSS-INTERROGATORY HE SAITH:

I have no knowledge on any of these matters.

THIRTY-FOURTH — TO THE THIRTY-
FOURTH CROSS-INTERROGATORY HE
SAITH:

I have no knowledge on any of these matters.

THIRTY-FIFTH—TO THE THIRTY-FIFTH
CROSS-INTERROGATORY HE SAITH:

I have no knowledge on any of these matters.

THIRTY-SIXTH—TO THE THIRTY-SIXTH
CROSS-INTERROGATORY HE SAITH:

I have no knowledge on any of these matters.

THIRTY-SEVENTH—TO THE THIRTY-SEV-
ENTH CROSS-INTERROGATORY HE
SAITH:

I have no knowledge on any of these matters.

EUGENE FRANCOIS MEEUWISSEN,

HARRY TUCK SHERMAN,

Commissioner.

KINGDOM OF BELGIUM,

PROVINCE OF ANTWERP,

AMERICAN CONSULATE GENERAL—ss.

THIS IS TO CERTIFY THAT I, HARRY
TUCK SHERMAN, VICE CONSUL GENERAL
OF THE UNITED STATES OF AMERICA, IN
THE CITY OF ANTWERP, KINGDOM OF BEL-
GIUM, BY VIRTUE OF THE FOREGOING
COMMISSION TO ME DIRECTED, CAUSED
THE ABOVE NAMED EUGENE FRANCOIS
MEEUWISSEN, APPEARING FOR THE DE-
FENDANT THEREIN MENTIONED, TO COME
BEFORE ME IN THE UNITED STATES CON-
SULATE GENERAL IN SAID PROVINCE OF
ANTWERP, ON THE SIXTH DAY OF SEP-
TEMBER, A. D., 1911, AND THAT THE FORE-
GOING DEPOSITION SUBSCRIBED BY SAID
DEPONENT WAS TAKEN BEFORE ME AT,
THE UNITED STATES CONSULATE GENER-
AL, IN SAID PROVINCE OF ANTWERP, ON

THE DATE LAST NAMED, BETWEEN THE HOURS OF TEN O'CLOCK A. M. AND SIX O'CLOCK P. M. ON SAID DAY, AND THE SAME WAS BY ME REDUCED TO WRITING. THAT BEFORE PROCEEDING TO THE EXAMINATION THE SAID DEPONENT WAS BY ME DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, IN ANSWER TO THE SEVERAL INTERROGATORIES AND CROSS-INTERROGATORIES ANNEXED, AND THEREUPON HE MADE AND GAVE THE FOREGOING ANSWERS; THAT THE SAID DEPOSITION WHEN COMPLETED WAS BY ME READ TO SAID DEPONENT, AND THE SAME WAS THEREUPON BY HIM IN MY PRESENCE SUB-ED.

IN TESTIMONY WHEREOF I HEREUNTO SET MY HAND AND THE SEAL OF SAID CONSULATE GENERAL OF THE UNITED STATES OF AMERICA, THIS SIXTH DAY OF SEPTEMBER, 1911.

HARRY TUCK SHERMAN,
AMERICAN VICE CONSUL GENERAL,
COMMISSIONER.

Filed Apr. 9, 1912.

A. M. CANNON,
Clerk U. S. District Court.

John H. Brown
John H. Brown
John H. Brown

John H. Brown
John H. Brown
John H. Brown

John H. Brown
John H. Brown
John H. Brown

John H. Brown
John H. Brown
John H. Brown

[Exhibit B.]

CORNELSEN & Co.

Stevedores & Checkweighers.

3 m|s Barque BABIN CHEVAYE.

Merk Capt. Lebeaupin.

Partij Portland, O.

Ontvanger Deverset.

Antwerp, 16 2 1909.

EUGENE FRANCOIS MEEUWISSEN,

HARRY TUCK SHERMAN,

Commissioner.

3 m|s Barque BABIN CHEVAYE.

16 Fevrier, 1909.

Chargement Cale et Entrepont.

Cale.

Poids. Date

Marchandises.

d'embarquement.

200 barres, Fer. 4 34,909 5 Janiver, 1909

801 barres, Fer. 10 24,290 "

2293 barres, Fer. 10 80,240 "

479 bottes, Fer. 23,897 "

835 barres, Fer. 5 50,630 6 "

35 barres, Fer. 4 13,406 "

914 bottes, Fer. 10 46,830 7 "

225 barres, Fer. 5 25,395 "

125 barres, Fer. 5 22,815 "

500 bottes, Fer. 25,330 "

450 barres Cornieres 36,170 "

95 barres Cornieres 24,905 8 "

4399 barres, Fer. 10 56,223 "

2500 barres, Fer. 10 24,870 9 "

Le Anvers, 16 Février 1909

E. 116 A

Eugène Francis Hecquembourg
 Henry Hecquembourg
 Communes

[Exhibit B.]

CORNELSEN & Co.

Stevedores & Checkweighers.

3 m|s Barque BABIN CHEVAYE.

Merk Capt. Lebeaupin.

Partij Portland, O.

Ontvanger Deverset.

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EUGENE FRANCOIS MEEUWISSEN,

HARRY TUCK SHERMAN,

Commissioner.

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450 barres Cornieres 36,170 "

95 barres Cornieres 24,905 8 "

4399 barres, Fer. 10 56,223 "

2500 barres, Fer. 10 24,870 9 "

Fonte Ormesby	350,000	26-27	“
Fonte Cleveland	90,000	29	“
Cokes	75,000	29	“
Cokes	55,000	29	“
Cokes	90,000	30	“
Cokes	45,000	2	Fevrier,
Cokes	97,500	3	“
Cokes	45,000	4	“
Cokes	92,500	5	“

1,429,910

Cale.

Suite.

Marchandises.

Poids.

Date.

Report.....1,429,910 Ko.

562 barels Cement	101,160	Ko 1	Fev. 1909
1080 barels Cement	194,400	“ 2	“
858 barels Cement	154,440	“ 3	“
Cokes	30,000	“ 4	“
Cokes	75,000	“ 5	“
Cokes	15,000	“ 6	“
Cokes	30,000	“ 10	“

2,029,910 Kos Totale

Fond du navire

LE MARQUEUR,

E. MEEUWISSEN.

Entrepont.

Marchandises.	Poids.	Date.
425 caisses Eau Minerale	35,800	11 Janvier, 1909
40 Fers plats	23,495	23 “
114 Fers plats	25,295	“

15 barres fer. 5	5,650	25	"
36 barres plats	8,675		"
56 barres plats	24,320		"
69 barres plats	31,499	26	"
50 barres plats	24,955	28	"
300 caises Wishky	6,253	30	"
62 colis Marbre	14,000		"
53 barels Ocre	20,281	4 Fevrier	
465 colis diverses	15,228		"
50 caises Eau Minerale	3,850		"
1 colis marbre	1,050		"
50 sacs talcum	5,000		"
125 barels Venetian red	20,739	5	"
150 sacs graine de Chanvre..	15,300		"
50 barels Ocre	19,000	10	"
100 sacs graine	11,000	13	"
910 barels ciment	163,800		"
590 barels ciment	106,200	14	"
940 barels ciment	169,200	15	"

750,590

Fonte Cleveland210,000 28 Janvier

LE MARQUEUR,

E. MEEUWISSEN.

960,590 Totale entrepont

DIRECT INTERROGATORIES TO BE PRO- POUNDED TO E. GARNUCHOT.

1. State your name, age, residence and occupation.

2. What relation did you sustain to the Bureau Veritas in February, 1909?

3. What is the Bureau Veritas.

4. Are you familiar with the French Bark Babin Chevaye?

5. Did you make any examination of the Babin Chevaye immediately prior to her voyage from Antwerp to Portland, which voyage began on the 16th of February, 1909?

6. If the witness answer the last question in the affirmative, then let him state fully and in detail the character of the examination made by him.

7. What was the purpose of this examination?

8. What did you find the condition of the vessel to be?

9. Were the decks tight?

10. What was the condition of the rivets and stanchions?

11. What was the general condition of the ship as to being staunch and seaworthy or the reverse?

12. What had been done at Antwerp with a view to preparing the vessel for this voyage?

13. What experience have you had as a seafaring man? State fully.

14. What experience have you had in the examination and survey of sailing vessels? State fully.

15. What experience have you had in the stowage of cargoes on vessels and in examining and reporting on such stowage?

16. What in your judgment is a proper distribution of the cargo of the Babin Chevaye as between the lower hold and the between decks?

17. What, if any, would be the effect of a departure to the extent of fifty or one hundred tons from the

rule as outlined by you in answer to the last interrogatory?

18. Is there any difference in the rule governing distribution of cargo between French sailing vessels and British sailing vessels, and if so, what is the occasion for such difference?

19. Is the rule governing distribution of cargo as between the hold and the between decks a rigid and inflexible rule, or does it vary with different vessels and with the charter of the cargo? State fully.

20. Under what deck was the cargo of the Babin Chevaye stowed?

21. Was any of the cargo stowed under the poop deck?

22. Was it possible for leakage in the poop deck to damage the cargo of the Babin Chevaye if the vessel remained in other respects tight, staunch and seaworthy.

23. State any other fact within your knowledge material to the issues involved in this case.

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.
W. WILSON and JOHN M. QUAILE, part-
ners as MEYER, WILSON and COMPANY,
Libellants,

vs.

THE FRENCH BARK "BABIN CHEVAYE,"
Defendant,
BUREAU FRERES & BAILLERGEAU,
Claimant.

CROSS INTERROGATORIES TO BE PRO-
POUNDED TO THE WITNESS, E.
GARNUCHOT.

1. State how long a time your examination of the Babin Chevaye occupied.

2. At whose request did you examine her?

3. For what purpose did you examine her?

4. Was it to give her a rating in Bureau Veritas for marine insurance?

5. State what decks you particularly examined and state the method of your examination.

6. Who was with you when you examined the decks?

7. How long a time were you engaged in examining the decks?

8. Did you examine the seams of the main deck?

9. If you did, state if you examined all of them through the length of the ship?

10. If you did not do so, then state exactly what you did do.

11. How did you examine the rivets and stanchions and what rivets and stanchions did you examine?

12. Did you examine the rivets of the hull plate?

13. If you state you did, state whether you examined them from the outside as well as the inside.

14. Were the rivets and stanchion joints covered with paint?

15. Question 8 is objected to as calling for a conclusion. Witness should state the facts.

16. 'Question 10—same objection.

17. Question 11—same objection.

18. If in answer to question 12 you state something had been done at Antwerp with a view to preparing the vessel for its voyage, state whether you know what had been done of your own personal knowledge.

19. Were you present when it was done?

20. Who ordered it done?

21. State particularly in detail exactly what was done in which part of the ship.

2. If you state that the main deck was caulked, state how many men were employed in caulking.

23. State how long a time these men were employed in re-caulking the deck.

24. Do you know when the main deck of the Babin Chevaye was wholly re-caulked prior to February 1909?

25. If so, state when it was.

26. Have you any record, or any record of the Bureau Veritas, showing the last time the Babin Chevaye was completely overhauled and her decks completely re-caulked prior to February, 1909?

27. If so, read the record into your deposition as a part of your answer.

28. If you state that any re-caulking of the main deck of the Babin Chevaye was done preparatory to this voyage (February, 1909), state whether it was an entire re-caulking of the whole deck.

29. Have you in your possession, or can you get from the owners or agents of the Babin Chevaye, the bills for any work done on the Babin Chevaye, pre-

paratory to this voyage, commencing February, 1909, and especially any bills for material and labor for the re-caulking of the main deck?

30. Question 16 is objected to as incompetent, irrelevant and immaterial.

31. Have you ever sailed on the Babin Chevaye?

32. What experience have you had as to the stowage of her cargoes since her construction?

33. What experience have you as to the stowage of her cargoes and their delivery in the past six years?

34. On what do you base your judgment as to the proper distribution of cargo in the Babin Chevaye?

35. Would it make any difference in distribution as to whether the cargo was a solid cargo or one commodity or a general or mixed cargo?

36. Would it make any difference in distribution whether the cargo was pig iron or steel rails or cotton prints?

37. If you state in answer to Question 18 that there is a difference in the rule governing distribution of cargo between French sailing vessels and British sailing vessels, state what the French rule is. Then state what the English rule is.

38. State whether they are exact rules or whether differences are made in particular ships and particular cargoes?

39. If you state there are differences, state how the various differences are adjusted to the rule.

40. How do you know where the cargo of the Babin Chevaye was stowed for this voyage?

41. Were you present all the time of the stowage?

42. Question 22 is objected to as calling for a conclusion.

43. If you state that no leakage through the poop deck could reach the cargo of the Babin Chevaye state why not. Give your reasons fully.

44. Have you any interest in the Babin Chevaye?

45. Have you any interest with the owners in any other respect?

46. Do you derive any fees, commissions or any part of your wages or income from the owners of the Babin Chevaye?

47. Who was with you when you examined the Babin Chevaye?

48. State everybody that was with you and whether they were with you all the time.

49. If not state for how long a time you were accompanied by anyone and by whom.

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER, H. L. E. MEYER, JR., J.
W. WILSON and JOHN M. QUAILE, part-
ners as MEYER, WILSON and COMPANY,
Libellants,

vs.

THE BARK "BABIN CHEVAYE,"

Defendant,

BUREAU FRERES & BAILLERGEAU,

Claimant.

DEPOSITION OF WITNESS PRODUCED,
SWORN AND EXAMINED THE SIXTEENTH
DAY OF SEPTEMBER, A. D., ONE THOUSAND

NINE HUNDRED AND ELEVEN AT THE AMERICAN CONSULATE GENERAL AT ANTWERP, BELGIUM, UNDER AND BY VIRTUE OF A COMMISSION ISSUED OUT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON, IN A CERTAIN CAUSE THEREIN DEPENDING AND AT ISSUE BETWEEN GEORGE H. C. MEYER, H. L. E. MEYER, JR., J. W. WILSON AND JOHN M. QUAILE, PARTNERS AS MEYER, WILSON AND COMPANY, LIBELLANT AND THE BARK "BABIN CHEVAYE," DEFENDANT, AND BUREAU & BAILLERGEAU, CLAIMANT, AS FOLLOWS:

EMILE GARNUCHOT, AGED 38½ YEARS, RESIDING AT ANTWERP, BELGIUM, BEING DULY AND PUBLICLY SWORN PURSUANT TO THE DIRECTIONS HERETO ANNEXED, AND EXAMINED ON THE PART OF THE DEFENDANT AND CLAIMANT, DOTH DEPOSE AND SAY AS FOLLOWS:

FIRST—TO THE FIRST INTERROGATORY HE SAITH:

Emile Garnuchot, 38½ years of age, Antwerp, Inspector the Bureau Veritas.

SECOND—TO THE SECOND INTERROGATORY HE SAITH:

HARRY TUCK SHERMAN,

Commissioner.

Expert of Bureau Veritas.

THIRD—TO THE THIRD INTERROGATORY

HE SAITH:

The Bureau Veritas is an International Society for the classification of vessels. For further particulars see the first pages of the Regulations which I hand to you, marked Exhibit D, in which this question is wholly described.

The French Government has recognized the Bureau Veritas for carrying out the laws and decrees relating to the safety of navigation.

On presentation of the Certificates of the Bureau Veritas (re hull, engines and boilers) the Maritime or Consular Authorities deliver the permits of navigation. French or foreign vessels classed in the Bureau Veritas and in order with this Society, are exempt in France and the Colonies, from the "sailing visits" instituted by the laws and decrees on the safety of navigation. Provisions similar to those in favor of vessels classed in the Bureau Veritas exist in the Maritime Laws of most of the Maritime Countries.

The French Government has entrusted the Bureau Veritas with drawing up official Freeboard scales, which alone can be applied to French vessels.

FOURTH—TO THE FOURTH INTERROGATORY HE SAITH:

I only know the "Babin Chevaye" by the examinations I made on board in January, 1909.

FIFTH—TO THE FIFTH INTERROGATORY HE SAITH:

Yes.

SIXTH—TO THE SIXTH INTERROGATORY HE SAITH:

I inspected the "Babin Chevaye" afloat and in dry-dock at Antwerp, according to Art: 8 of the Rules, for her heavy survey (inspection of the vessel in dry-dock general inside examination—rigging—deck and caulking—winches—windless—outfit—donkey boiler—

HARRY TUCK SHERMAN,

Commissioner.

er.

SEVENTH—TO THE SEVENTH INTERROGATORY HE SAITH:

To ascertain the condition of the vessel for classification purposes.

EIGHTH—TO THE EIGHTH INTERROGATORY HE SAITH:

After having ordered the hereafter described repairs, I consider that the "Babin Chevaye," at that time, was in good seaworthy condition. It is therefore, I have "signed" the certificate of this vessel for the maintenance of her class.

NINTH—TO THE NINTH INTERROGATORY HE SAITH:

Yes.

TENTH—TO THE TENTH INTERROGATORY HE SAITH:

I only found one stanchion in very bad state at the fore part of the fore hatch which I have ordered to be repaired.

Some rivets have been renewed in the other stanchions.

ELEVENTH—TO THE ELEVENTH INTERROGATORY HE SAITH:

This vessel was strong and in good seaworthy condition.

TWELFTH—TO THE TWELFTH INTERROGATORY HE SAITH:

The following are the works executed at Antwerp, under my supervision, to put the "Babin Chevaye" in good condition.

Drydocking of the vessel. Cleaning the bottom. Two coatings of paint. Lifted the rudder for examination and overhauling the hinges, pintles, etc., of the rudder. Changed two rivets in the back piece of the rudder. Overhauling the steering gear.

The vessel having collided with the quay in maneuvering and damaged her port quarter, the tenth frame counting from the after bulkhead had been broken in three places above the waterline in the afterpeak. To repair same, we have fitted a butt-strap in going from the lower stringer to 5th rivet above the upper crack. In the holds, replaced some rivets in stanchions, repaired the stanchion at the fore part of the fore hatch, inspected the cement in bottom and

HARRY TUCK SHERMAN,

Commissioner.

found same in good condition. Inspected the decks and their caulking, the masts and anchors, which were in good condition. A small repair was done to the stock of the starboard anchor. The windlass was examined and repaired. Donkey boiler:—Placed 4 vertical boiler stays of 50 millimeters—placed 2 boiler stays to prevent a bulb. Tested by water the donkey boiler up to 11 Kg., found in order. Regulated

the valves under steam at 8 Kgs. Donkey engine repaired, changed the pistons on the water end? Tested the engine after repairs.

The above details are taken from my note book in which I mentioned them at the time of the survey.

THIRTEENTH—TO THE THIRTEENTH INTERROGATORY HE SAITH:

I have served in the French Navy, and am at present a lieutenant of the Naval Reserve.

FOURTEENTH—TO THE FOURTEENTH INTERROGATORY HE SAITH:

I have belonged for 11 years (successively as assistant surveyor, surveyor, sub-inspector, Inspector) to the Bureau Veritas, where our duty is to inspect vessels of all kinds, to superintend the repairs and the building of new vessels in the shipyards.

Our head office recruits their Surveyors amongst those who have their diplomas and experience to fulfill these duties.

FIFTEENTH—TO THE FIFTEENTH INTERROGATORY HE SAITH:

This question is absolutely distinct from the visits made by me on board the "Babin Chevaye", as already described. I cannot answer. I must remark that no Surveyors of any Society for the classification of vessels have in their attributions the survey of the stowage of cargo in vessels. We have not to control this work.

SIXTEENTH—TO THE SIXTEENTH INTERROGATORY HE SAITH:

I have no knowledge of how the "Babin Chevaye" was loaded.

HARRY TUCK SHERMAN,
Commissioner.

SEVENTEENTH—TO THE SEVENTEENTH
INTERROGATORY HE SAITH:

I have no knowledge of how the "Babin Chevaye" was loaded.

EIGHTEENTH—TO THE EIGHTEENTH IN-
TERROGATORY HE SAITH:

I have no knowledge of how the "Babin Chevaye" was loaded.

NINETEENTH—TO THE NINETEENTH IN-
TERROGATORY HE SAITH:

I have no knowledge of how the "Babin Chevaye" was loaded.

TWENTIETH—TO THE TWENTIETH IN-
TERROGATORY HE SAITH:

I have no knowledge of how the "Babin Chevaye" was loaded.

TWENTY-FIRST—TO THE TWENTY-FIRST
INTERROGATORY HE SAITH:

I have no knowledge of how the "Babin Chevaye" was loaded.

TWENTY-SECOND—TO THE TWENTY-SEC-
OND INTERROGATORY HE SAITH:

It was not possible for leakage in the poop deck to damage the cargo of the "Babin Chevaye", otherwise not only the poop deck must have leaked (and this was in order as per my survey) but also the main deck must have leaked, which was also in order. The main

deck is protected by the poop deck.

TWENTY-THIRD—TO THE TWENTY-THIRD
INTERROGATORY HE SAITH:

I have nothing to add.

CROSS INTERROGATORIES

FIRST—TO THE FIRST CROSS-INTERROGA-
TORY HE SAITH:

After so long, and after having surveyed so many vessels since January, 1909, it is difficult for me to reply with precision. All I can say is that the inspection of the "Babin Chevaye" took several days in January, 1909.

HARRY TUCK SHERMAN,

Commissioner.

SECOND—TO THE SECOND CROSSINTER-
ROGATORY HE SAITH:

It is customary, when a vessel must pass her survey, that the Master or Owners advise us when she is empty, and at our disposal for inspection. This must have been also the case for the "Babin Chevaye" as far as I can remember.

THIRD—TO THE THIRD CROSS-INTERROG-
ATORY HE SAITH:

To pass her yearly survey according to Art: 8 of the Rules which I have handed you. (Exhibit D.)

FOURTH—TO THE FOURTH CROSS-INTER-
ROGATORY HE SAITH:

Yes. A vessel is stated to have a certain rating in certain classes in the Bureau Veritas, that means to say that her build (hull, decks, rigging, engines, boilers, winches and windlass, out fit and all dependences)

complies with all the requirements of Rules in your possession and that since her building she has been submitted to all the required surveys and that in consequence of these surveys she has been found, or has been put in good condition. For full details see the Rules, marked Exhibit D.

FIFTH—TO THE FIFTH CROSS-INTERROGATORY HE SAITH:

I made the general inspection of the decks, examining the main deck, poop deck and fore castle deck by sounding the seams.

SIXTH—TO THE SIXTH CROSS-INTERROGATORY HE SAITH:

As soon as a vessel to be inspected is at our disposal, we have free access on board, (as per Rules marked Exhibit D), and need not to be accompanied by any one.

We make our inspection at the time we think it best to do so, to see the condition of things or follow, accompanied by some one representing the Owner, or

It is probable that on my first visit on board I was the repairs ordered.

some one belonging to the vessel, as this is customary, but I do not remember who was with me for the reasons stated in reply No. 1. As inspector of the Bureau Veritas I act alone.

SEVENTH—TO THE SEVENTH CROSS-INTERROGATORY HE SAITH:

HARRY TUCK SHERMAN,

Commissioner.

I did not make any note of the exact time occupied

in this particular work as explained in my answer to question No. 1.

EIGHTH—TO THE EIGHTH CROSS-INTERROGATORY HE SAITH:

Yes.

NINTH—TO THE NINTH CROSS-INTERROGATORY HE SAITH:

When it is stated that a deck has been examined, this means that it has been inspected from fore till aft, to starboard and to port, in such a way as to examine every part of the deck and completely. This is what I mean by having inspected the decks.

This inspection of the decks ~~on the decks~~ was completed by the inspection of the decks in the holds, where I examined the underneath to see if there were no leaky rivets.

I found none and the caulking was in order.

TENTH—TO THE TENTH CROSS-INTERROGATORY HE SAITH:

I did examine all of the seams of the main deck as explained in my answer to question No. 9.

ELEVENTH—TO THE ELEVENTH CROSS-INTERROGATORY HE SAITH:

In passing through the holds I examined all the stanchions and examined if the top and bottom rivets were tight.

TWELFTH—TO THE TWELFTH CROSS-INTERROGATORY HE SAITH:

Yes. As customary, when a vessel is in dry dock, I examined the hull of a vessel underneath, and on the sides, I test with the hammer all rivets which do not

seem quite in order or doubtful, which condition cannot escape any one who knows what a doubtful rivet is. That is how I proceeded.

THIRTEENTH — TO THE THIRTEENTH CROSS-INTERROGATORY HE SAITH:

My reply to question No. 12 applies to outside examination.

As to inside examination, I must remark that generally the ceiling and lining and bulk heads hide part of the inside of the hull and that I can only see those places where the plating is bare. I examine particularly the holds to discover leaky rivets. That is how I

HARRY TUCK SHERMAN,

Commissioner.

proceeded. No regulation of any Society for the classification of vessels nor of any Maritime Country compels an owner to take down the ceiling and lining every year without having serious doubts as to the state of the rivets in the plating, which doubts would rise from the outward examination described in answer to direct interrogatory No. 12.

FOURTEENTH — TO THE FOURTEENTH CROSS-INTERROGATORY HE SAITH:

When I examined the stanchions, I was only concerned with their good condition and that of their rivets. I paid no attention to their being more or less painted.

FIFTEENTH—TO THE FIFTEENTH CROSS-INTERROGATORY HE SAITH:

— — — — —

SIXTEENTH—TO THE SIXTEENTH CROSS-

INTERROGATORY HE SAITH:

— — — — —

SEVENTEENTH—TO THE SEVENTEENTH
CROSS-INTERROGATORY HE SAITH:

— — — — —

EIGHTEENTH — TO THE EIGHTEENTH
CROSS-INTERROGATORY HE SAITH:

I know of my own personal knowledge what was done, as detailed in my answer to question No. 12. (Direct interrogatory).

NINETEENTH — TO THE NINETEENTH
CROSS-INTERROGATORY HE SAITH:

I followed the repairs and made sure that they were done in good condition.

TWENTIETH—TO THE TWENTIETH CROSS-
INTERROGATORY HE SAITH:

The Bureau Veritas.

TWENTY-FIRST—TO THE TWENTY-FIRST
CROSS-INTERROGATORY HE SAITH:

The following are the works executed at Antwerp, under my supervision, to put the "Babin Chevaye" in good condition:—

Dry-docking of vessel. Cleaning the bottom. Two coatings of paint. Lifted the rudder for examination

HARRY TUCK SHERMAN,

Commissioner.

and overhauling the hinges, pintles, &c., of the rudder. Changed two rivets in the back piece of the rudder. Overhauling the steering gear.

The vessel having collided with the quay in maneuvering and damaged her port quarter, the tenth

frame counting from the after bulkhead had been broken in three places above the waterline in the afterpeak. To repair same, we have fitted a butt-strap in going from the lower stringer to 5th rivet above the upper crack. In the holds, replaced some rivets in stanchions, repaired the stanchion at the fore part of the fore hatch, inspected the cement in bottom and found same in good condition. Inspected the decks and their caulking, the masts and anchors, which were in good condition. A small repair was done to the stock of the starboard anchor. The windlass was examined and repaired. Donkey boilers:—Placed 4 vertical boiler stays of 50 millimeters—placed two boiler stays to prevent a bulb. Tested by water the donkey boiler up to 11 Kg., found in order. Regulated the valves under steam at 8 Kgs. Donkey engine repaired, changed the pistons on the water end. Tested the engine after repairs.

The above details are taken from my note book in which I mentioned them at the time of the survey.

TWENTY-SECOND—TO THE TWENTY-SECOND CROSS-INTERROGATORY HE SAITH:

The main deck was not caulked here.

TWENTY-THIRD—TO THE TWENTY-THIRD CROSS-INTERROGATORY HE SAITH:

See my answer to direct interrogatory No. 12.

TWENTY-FOURTH — TO THE TWENTY-FOURTH CROSS-INTERROGATORY HE SAITH:

I do not know.

TWENTY-FIFTH—TO THE TWENTY-FIFTH

CROSS-INTERROGATORY HE SAITH:

I do not know.

TWENTY-SIXTH—TO THE TWENTY SIXTH
CROSS-INTERROGATORY HE SAITH:

According to the Register this vessel passed her
HARRY TUCK SHERMAN,
Commissioner.

complete classification visit in February, 1906, when she was surveyed more completely than on her annual survey; as to the re-caulking of the decks I do not know when this was done, nor do I know what repairs were carried out before. I have no document to this effect.

TWENTY-SEVENTH — TO THE TWENTY-
SEVENTH CROSS-INTERROGATORY HE
SAITH:

— — — — —

TWENTY-EIGHTH — TO THE TWENTY-
EIGHTH CROSS-INTERROGATORY HE
SAITH:

No re-caulking in Antwerp.

TWENTY-NINTH—TO THE TWENTY-NINTH
CROSS INTERROGATORY HE SAITH:

This does not concern me. The surveyor has nothing to do with the amounts paid for the repairs. He has only to see that the work ordered is properly done. It would even be incorrect for a surveyor to discuss repairing accounts, as it might lead to suspicion of preference for one or the other of the repairing shops.

THIRTIETH—TO THE THIRTIETH CROSS-
INTERROGATORY HE SAITH:

— — — — —

THIRTY-FIRST — TO THE THIRTY-FIRST
CROSS-INTERROGATORY HE SAITH:

No.

THIRTY-SECOND — TO THE THIRTY-SEC-
OND CROSS-INTERROGATORY HE SAITH:

This question has no connection with my evidence. The Surveyors of the Bureau Veritas and of any other Society for classing vessels have nothing to do with the stowage or the superintending of same. As soon as the Surveyors have made sure of the seaworthiness of a vessel and of her strength, they sign the certificate "ad hoc" and do not concern themselves any more with the vessel. Most of the time they do not even know what the cargo will consist of. I cannot, therefore, answer this question.

HARRY TUCK SHERMAN,

Commissioner.

THIRTY-THIRD—TO THE THIRTY-THIRD
CROSS-INTERROGATORY HE SAITH:

I cannot answer this question, for the reasons given in my reply to cross interrogatory thirty-two.

THIRTY-FOURTH — TO THE THIRTY-
FOURTH CROSS-INTERROGATORY HE
SAITH:

I cannot answer this question.

THIRTY-FIFTH — TO THE THIRTY-FIFTH
CROSS-INTERROGATORY HE SAITH:

I cannot answer this question.

THIRTY-SIXTH—TO THE THIRTY-SIXTH
CROSS-INTERROGATORY HE SAITH:

I cannot answer this question.

THIRTY-SEVENTH—TO THE THIRTY-SEVENTH CROSS-INTERROGATORY HE SAITH:

I cannot answer this question.

THIRTY-EIGHTH — TO THE THIRTY-EIGHTH CROSS-INTERROGATORY HE SAIH:

I cannot answer this question.

THIRTY-NINTH—TO THE THIRTY-NINTH CROSS-INTERROGATORY HE SAITH:

I cannot answer this question.

FORTIETH—TO THE FORTIETH CROSS-INTERROGATORY HE SAITH:

I cannot answer this question.

FORTY-FIRST — TO THE FORTY-FIRST CROSS-INTERROGATORY HE SAITH:

I cannot answer this question.

FORTY-SECOND—TO THE FORTY-SECOND CROSS-INTERROGATORY HE SAITH:

— — — — —

FORTY-THIRD — TO THE FORTY-THIRD CROSS-INTERROGATORY HE SAITH:

The poop deck is over a portion of the main deck and the main deck being caulked and in good condition any leakage through the poop deck could not have reached the cargo unless through straining of the main deck, that also had leaked, but as already stated when the vessel sailed the caulking both of the poop deck and of the main deck was in good and seaworthy condition.

HARRY TUCK SHERMAN,

Commissioner.

FORTY-FOURTH—TO THE FORTY-FOURTH
CROSS-INTERROGATORY HE SAITH::

No.

FORTY-FIFTH — TO THE FORTY-FIFTH
CROSS INTERROGATORY HE SAITH:

No.

FORTY-SIXTH — TO THE FORTY-SIXTH
CROSS INTERROGATORY HE SAITH:

No. My Paris Committee pay me a yearly salary
for my duties of Surveyor at Antwerp.

FORTY-SEVENTH — TO THE FORTY-SEV-
ENTH CROSS-INTERROGATORY HE
SAITH:

I have replied to this question. I do not remem-
ber.

FORTY-EIGHTH—TO THE FORTY-EIGHTH
CROSS-INTERROGATORY HE SAITH:

My recollections of 1909 are too faint to enable me
to reply.

FORTY-NINTH — TO THE FORTY-NINTH
CROSS INTERROGATORY HE SAITH:

I do not remember. My recollections of the year
1909 are too faint to enable me to reply.

E. GARNUCHOT,
KINGDOM OF BELGIUM,
PROVINCE OF ANTWERP,
AMERICAN CONSULATE GENERAL—ss.

THIS IS TO CERTIFY THAT I, HARRY
TUCK SHERMAN, VICE CONSUL GENERAL
OF THE UNITED STATES OF AMERICA, IN
THE CITY OF ANTWERP, KINGDOM OF BEL-

GIUM, BY VIRTUE OF THE FOREGOING COMMISSION TO ME DIRECTED, CAUSED THE ABOVE NAMED EMILE GARNUCHOT, APPEARING FOR THE DEFENDANT THEREIN MENTIONED, TO COME BEFORE ME IN THE UNITED STATES CONSULATE GENERAL IN SAID PROVINCE OF ANTWERP, ON THE SIXTEENTH DAY OF SEPTEMBER, A. D., 1911, AND THAT THE FOREGOING DEPOSITION SUBSCRIBED BY SAID DEPONENT, WAS TAKEN BEFORE ME AT THE UNITED STATES CONSULATE GENERAL, IN SAID PROVINCE OF ANTWERP, ON THE DATE LAST NAMED, BETWEEN THE HOURS OF TEN O'CLOCK A. M. AND SIX O'CLOCK P. M. ON SAID DAY, AND THE SAME WAS BY ME REDUCED TO WRITING. THAT BEFORE PROCEEDING TO THE EXAMINATION THE SAID DEPONENT WAS BY ME DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, IN AN-

HARRY TUCK SHERMAN,

Commissioner.

SWER TO THE SEVERAL INTERROGATORIES AND CROSS-INTERROGATORIES ANNEXED, AND THEREUPON HE MADE AND GAVE THE FOREGOING ANSWERS, THAT THE SAID DEPOSITION, WHEN COMPLETED, WAS BY ME READ TO SAID DEPONENT, AND THE SAME WAS THEREUPON BY HIM IN MY PRESENCE SUBSCRIBED.

IN TESTIMONY WHEREOF I HEREUNTO
SET MY HAND AND THE SEAL OF SAID
CONSULATE GENERAL OF THE UNITED
STATES OF AMERICA, THIS SIXTEENTH
DAY OF SEPTEMBER, 1911.

HARRY TUCK SHERMAN,
AMERICAN VICE CONSUL GENERAL,
COMMISSIONER.

(AMERICAN)
 CONSULAR)
 SERVICE)
(FEE STAMPS)

Consular fee No. 138.

Filed Apr. 9, 1912.

A. M. CANNON,
Clerk U. S. District Court.

*In the District Court of the United States for the
District of Oregon.*

MEYER, WILSON & COMPANY,

Libellants,

vs.

THE FRENCH BARK BABIN CHEVAYE,

Defendant,

BUREAU FRERES and BAILLERGEAU,

Claimants.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON.

This cause coming on for hearing this 18th day of
October, 1909, libellant appearing by C. E. S. Wood,
Esq.' their proctor, and the defendant and claimants
appearing by Wallace McCamant, their proctor,

thereupon it is stipulated by and between the parties that the testimony of F. M. Greenappin, M. A. F. Rehel and J. Lebeaupin, may be taken before George A. Brodie, a Notary Public for Oregon, and examiner in chancery of District Court of the United States for the District of Oregon upon oral examination, and that said testimony shall be extended by the said George A. Brodie and when so extended shall be received as evidence in the case, the signing of the testimony being waived, but the testimony as reported to be subject to all objections reserved at the time of taking the same. It is further stipulated that J. W. Matthes may be sworn as interpreter, and he shall interpret the examination of said witnesses at this hearing, and libellant gives notice that he will, and it is stipulated that he may, amend the libel so as to allege a damage of \$78 by reason of the bending of certain iron rods, and also so as to allege that the damage to the cement and iron was occasioned, or may have been occasioned by snow and rain during the loading, or while in the custody of the ship.

J. W. MATTHES, is sworn as an interpreter herein, thereupon M. A. F. REHEL is called as a witness for the defendant and claimants, and having been duly sworn through the interpreter, testified as follows:

Direct Examination.

(Questions by Mr. WALLACE McCAMANT):

Q. State your name, age, residence and occupation.

A. M. A. F. Rehel; 35 years old; residence Dinan;

occupation, deep sea captain.

Q. How long have you followed the sea as your occupation?

A. Since 1890.

Q. How long have you been an officer?

A. Four years.

Q. Are you qualified and licensed as a master of a French vessel?

A. Yes.

Q. What experience have you had with the storage of vessels, and with the distribution of the cargo as between the 'tween decks and the hold?

A. I have had experience, and I know what is necessary, or what is asked at the examination to become a deep sea captain; besides that I have had the experience of superintending loading four cargoes.

Q. What position did you hold on the Babin Chevaye?

A. First Mate.

Q. How long have you been one of the officers of the Babin Chevaye?

A. Eight months.

Q. Were you present when the Babin Chevaye was loaded with her cargo on her voyage from Antwerp to Portland, Oregon?

A. I superintended the loading of the cargo except the loading of the stiffening.

Q. I am asking about the voyage which began on the 16th of February, 1909?

A. Yes, we left Antwerp on the 16th of February, 1909.

Q. Is that the voyage on which you superintended the storage of the cargo except the stiffening?

A. Yes.

Q. State what, in your opinion, is the proper distribution of the cargo as between the 'tween decks and the hold on the Babin Chevaye?

A. It is my opinion that on this ship and other ships two thirds in the hold and one-third 'tween decks.

Q. Of how many tons did the cargo consist on the voyage which began on the 16th of February, 1909?

A. I cannot say exactly, but in the neighborhood of three thousand tons.

Q. Of this cargo how much was in 'tween decks?

A. According to my records there have been in the neighborhood of one thousand tons.

Q. Have you a plan of the storage with you?

A. Yes, I have a plan that was made by me and another one by the talley clerk.

Q. Are you prepared to say whether or not the plan produced by you and prepared by you is a correct one of the storage of the cargo in the Babin Chevaye on the voyage which began February 16th, 1909, at Antwerp?

A. Yes, I can swear to it.

Proctor for defendant and claimants offer in evidence the plan identified by the witness, and the same is objected to by proctor for libellants as incompetent. The witness may use it to refresh his memory, but cannot introduce it to speak for itself independent of his evidence.

The document referred to is received and filed marked Claimant's Exhibit A.

Q. After the cargo was stowed in the lower hold, what, if anything was done to the hatches?

A. After the loading in the hold had been finished the main hatch was battened down and placed over it two heavy booms crosswise, and two other sticks on top of them, and they were nailed down with long nails—nailed down with nails six inches long.

Q. State whether or not the covering over the lower hold and main hatch was removed at any time prior to the arrival of the vessel at Portland?

A. No, this was absolutely impossible, because otherwise it would have been necessary to discharge the entire cargo in the 'tween decks.

Q. How many tons of pig iron was there in the cargo of the vessel on this voyage?

A. About 600 tons.

Q. Of this amount how much was in the lower hold and how much in the 'tween decks?

A. In the 'tween decks about 250 tons.

Q. Were you present every day while the cargo was being loaded at Antwerp?

A. Yes, every day, except the day that the stiffening was put on board.

Q. Was there any marine surveyor employed to superintend the storage?

A. The surveyor came on board twice a day.

Q. Do you remember his name?

A. Baines.

Q. R. R. Baines?

A. Yes.

Q. What manner of man is Mr. Baines as to his experience and qualifications to know whether the cargo was stowed **properly**?

A. I think that after 25 or 30 years' experience that he has been in that business he ought to be able to know it.

Q. Has he devoted his time, or the greater portion of it to that work?

A. Yes, for these many years.

Q. State whether the stowage of the cargo was altered or changed in any way after the vessel left Antwerp and before its arrival at Portland with reference to the proportion of the cargo in the 'tween decks as compared with that in the hold?

A. No.

Q. State whether any portion of the cargo was exposed to the weather at Antwerp while in custody of the ship and before it was loaded?

A. The iron was exposed on the dock for a certain time, which I am unable to state how long, because they have changed docks for loading.

Q. What portion of the iron was so exposed to the weather?

A. The flat iron which was in the 'tween decks.

Q. In whose custody was this iron while it was exposed to the weather?

A. I do not know.

Q. State whether or not the cement was exposed to the weather at Antwerp before loading.

A. No.

Q. Was any portion of the cargo exposed to the weather at Antwerp except the flat iron?

A. No.

Q. Who kept the log book of the vessel during her voyage from Antwerp to Portland?

A. It was kept by me as first officer, and by Mr. Collet as second mate up to May the 6th, because he was injured and replaced on that date, and until the arrival in Portland by Mr. Viaud who was promoted to second mate.

Q. Refreshing your memory about the entries in the log book of the vessel, I wish you would describe the weather which the vessel encountered from and after the 18th of April?

A. I can state that beginning about the 18th of April, that we have constantly had bad weather, and before; the weather on some days was better. The sea was so high and so much swell which made the vessel roll considerable, and if I remember right, we had a storm that week, particularly Wednesday and Thursday.

Q. State whether or not the weather strained the masts and rigging?

A. Yes, the masts were strained by the heavy rolling.

Q. State whether the decks were flooded by the high seas, and if so, how often?

A. During the storms it was impossible to be out on deck, it was too covered with water.

Q. How long did these conditions continue after the 18th of April?

A. We had bad weather ever since the 18th of April, and up to the time that we were about the level or about the height of Chile. We had bad weather up to the time that we were off the coast of Chile, 25 degrees south latitude, though the stormy weather continued until we reached the 37 degree south, which was on the 10th of June.

Q. I direct your attention to the 5th of May, and will ask you what the weather conditions were on that day?

A. I was on watch from 8 P. M. until midnight; the wind became strong during the evening and obliged us to sail before the wind, and during the following day the wind was very high, there was a strong wind, and in the morning when I was again on watch. I left the watch at noon and was replaced by Mr. Collet, who was second mate, about half past three a tremendous wave hit the vessel which had been noticed before by two men which were on watch on the deck. Two men at the wheel, and two other men standing next to them for assistance, the officer of the watch and second boatswain were on the poop deck at that time. This tremendous wave landed on the poop deck and tore the wheel house or wheel cover off and carried away two men, namely, one man at the wheel on the port side, and one of the other men which was standing near for assistance. The carpenter who was also standing near, was thrown violently against the rail, and he was assisted when he had already his legs overboard. He was caught by Riou, who was the man who had noticed the big wave coming.

Q. Who else were on the poop deck at the time this wave came?

A. Besides those men which were lost, there was two men also on the poop deck, both of whom noted this big wave coming, one called the attention of the other to it, so that there was in all eight men on the poop deck when this big wave landed on the ship.

Q. What were the names of the two men which were lost?

A. Jaouen and LeFur.

Q. State whether any one was hurt by the wave in addition to the two men who were lost?

A. I have not finished quite with what I was saying.

Q. Proceed.

A. The second mate was thrown against the railing of the poop ladder. The man who was at the wheel on the port side was found afterwards near the rail of the poop ladder with one of his legs broken. This same man by the name of Gallen also came on deck in contact with the wreck on the poop deck, and he suffered internal injuries on that account.

Q. What was done with Mr. Gallen?

A. He was immediately taken to the saloon and received all possible attention that could be given him.

Q. Where was he left?

A. He remained in the saloon until the vessel reached Hobart.

Q. Was he left at Hobart?

A. He was left at a hospital at Hobart.

Q. Continue your testimony with reference to the storm on the 6th of May, and the injury done to the cargo, if any?

A. The carpenter had his jaw smashed, and the second boatswain was the only one that then remained at the wheel, and he called in the assistance of the two men that were near the chart room on watch for assistance. They were asked to assist in clearing away the remnants left around the wheel because they interfered with the steering of the ship. They all remained at the wheel until they could be relieved by change of the crew, because one part of the crew is on the poop deck and one part of the crew was on the deck down below, so they maintained the ship on its course until they were relieved.

Q. State what effect this storm of the 6th of May had upon the vessel, or upon her cargo?

A. The storm or wave which landed on the ship on this day carried away the wall of the chart room, and also the wall inside, and all the apartments aft which filled with water, and the chart room was absolutely flooded, and everything was carried away.

Q. State whether it strained the vessel, caused it to leak water?

A. The water entered through the chart room, and went into the saloon and the sail room, and it had naturally no outlet unless it got down into the ship; but everybody was working hard to get the water out of the saloon as fast as possible.

Q. What was done in the way of repairing the damage done on the 6th of May?

A. The first thing that was done was to cover up again the chart room by a temporary door which was placed there.

Q. What else was done?

A. The wheel was working well yet, and the persons on the poop deck, as soon as the weather permitted it afterwards they have gone down in the hold to see what damage was done to the cargo.

Q. What did they find on examination of the cargo?

A. It was found that one of the stanchions was broken, and this was replaced by a new one so as to close up the opening.

Q. What evidence, if any, did they find of there having been sea water in the cargo?

A. All we could discover at that time was that the water had gone through the opening where the stanchion had broken and had fallen down on the barrels of cement.

Q. State what the weather conditions were after the 6th day of May until the vessel got to Hobart town, Tasmania?

A. We had at least one heavy storm once a week with constantly high seas.

Q. State how long the sea remained disturbed with the swell after such a storm as came once a week on this voyage?

A. There are different causes by which the sea can remain high; sometimes 48 hours before, and sometimes 48 hours after a strong gale. I want to mention that by a strong gale, I mean a real storm.

Q. State whether or not there was any other storm which strained the vessel as much or more than this storm on the 6th of May?

A. Yes, certainly, we had stronger storms or worse storms later on.

Q. How did the weather on this voyage from Antwerp to Hobarttown compare with the bad weather that you have experienced on other voyages in your 19 years or so of seafaring life?

A. It is the only voyage in my experience which I have made where we have suffered so much as on this particular voyage.

Q. When the vessel reached Hobart town, what, if anything was done with reference to the repair of the damage that had taken place?

A. We first sounded the wells, and found that there was no particular water in the hold, and taking into consideration that the ship was evidently strained, then we have removed the different stanchions along the deck and on the bulwarks and examined all the rivets and removed all those which appeared doubtful as to their stability, and replaced those that had been removed and secured them properly with the necessary bolts, and afterwards the cement was replaced, and then we dried all our sails which had been absolutely soaked ever since the 6th of May, and then the entire crew was sent down below to find what, if any barrels or other portions of the cargo had shifted, and if necessary to secure them which were not absolutely steady.

Q. Prior to your arrival at Hobart town had any-

thing been done to protect the cargo and to secure it from shifting during these storms?

A. The only time that the weather permitted I went down in the 'tween decks and in the hold when I found one barrel not absolutely well stowed, and I had it immediately rewedged.

Q. When the repairs at Hobart town were completed, what was the condition of the vessel?

A. The ship was in a good navigable condition.

Q. Was it staunch and prepared for the voyage to Portland?

A. Yes.

Q. What was the condition of the vessel when it left Antwerp?

A. In very good, navigable condition, staunch and strong.

Q. What was the weather that the vessel encountered on her voyage from Hobart town to Portland?

A. I mentioned before that we had stormy weather until we reach the 37th degree south latitude.

Q. What was the effect of the bad weather after you left Hobart town on the vessel with reference to her straining and laboring?

A. We suffered several stormy days after leaving Hobart, and during every storm the ship was badly strained, and particularly also on those days that the sea was very high when the vessel rolled.

Q. What caused the vessel to roll?

A. The high sea and the swell rather than the wind.

Q. State whether in these storms after leaving Hobart the decks were flooded at every storm?

A. At every storm the decks were covered with water.

Q. What, if anything, was done with reference to the care of the cargo on the voyage from Hobart to Portland?

A. We decreased or moderated the canvas so as to decrease the effect of the strain as much as possible.

Q. Was any examination made of the cargo from time to time between Hobart and Portland?

A. Yes, every time that the weather would permit the hatches were opened so as to allow an examination of the hold or cargo.

Q. What was done with reference to the cargo on these examinations?

A. All we did was to watch and rewedged any of the cargo where necessary.

Q. Prior to the time when the vessel reached Hobart town, what was done with reference to pumping out the hold as it filled with water from leaks?

A. The pumps were sounded at every quarter, and when any water was found we pumped until they were absolutely dry.

Cross Examination.

(Questions by Mr. C. E. S. WOOD):

Q. How long have you been with the Eabin Chevaye?

A. I have stated before, I have been eight months.

Q. You never were with her before?

A. Not in particular this ship, but I have been on others which are exactly the same.

Q. When you say that you think there ought to have been about one third of the cargo in the 'tween decks, are you speaking of this particular ship, or generally?

A. I refer to all French ships in general, built at Nantes, of same build, construction or capacity.

Q. She is a barque?

A. Yes.

Q. Square rigged?

A. Yes, what we call a three-mast bark.

Q. Now, when you said how many tons were in the 'tween decks, how many killos are there to a ton?

A. A French ton is 1000 killos.

Q. When you gave the number of tons in the 'tween decks, were you speaking from memory?

A. I mentioned the amount from memory, and from the record which I made at the time the ship was being loaded.

Q. Where is that record?

A. I have here two tallies; these two books were both written by the tally clerk, or were made up by the two of us jointly.

Q. The figures on the last column of the first page which column is headed "Poid" that is the weight, is it?

A. Yes, that is the weight.

Q. And this little book shows the total merchandise with the weight which went into the ship?

A. Yes, all the cargo on board is the total weight.

Q. Where does the loading of the 'tween decks begin in this book?

A. To show what is in the 'tween decks you must

refer to the notes behind the different items that is marked " 'tween decks."

Q. Point out one of those marks.

A. (The witness points out upon the third page the notation "Entrepont").

Q. Whatever is marked entrepont is between decks, and all the rest is in the lower hold?

A. Yes, with the exception, perhaps, of about 50 tons of pig iron which was used to ballast the ship properly, and also to use for stiffening in certain parts of the hold.

Q. Where was this 50 tons of pig iron put?

A. About 40 tons in the hold behind the coke, and 10 tons to wedge the iron in the lower hold.

Q. Are these two books duplicates?

A. Yes, one is an exact copy of the other.

Q. How did you happen to have both copies?

A. Because the talley clerk has given them both to me.

Q. Does not one belong to the tally clerk?

A. I do not know the exact reason, except in case I lose one I would then have another. Besides you may compare the hand-writing and you can see for yourself that it is absolutely identical.

Q. How many of these little books were made at the time of the loading?

A. Only these two, as far as I know.

Q. One of these really ought to have been left with the tally clerk, ought it not?

A. No doubt the tally clerk has a copy for himself. He gave me this book so that in case anybody should

ask me where a certain portion of the cargo was I could refer to the number and marks.

Q. Did you figure up from this little book the number of tons in the 'tween decks?

A. There was nothing which neessitated me to do so, but if you want me to do so I will do it now.

Q. You stated the number of tons in the 'tween decks in your testimony just now?

A. The calculation was made just at the time, that there was about 1000 tons in 'tween decks.

Q. Ask him if he was testifying from memory when he gave the number of tons in the 'tween decks, or whether he was testifying from having added up the figures in these books?

A. I made the addition during the discharge of the vessel, and remember that there was about 1000 tons.

Q. So that you are talking really from this little book rather than from any independent memory of the loading?

A. The way I arrived at 1000 tons was that I know in Antwerp there was about 750 tons of general cargo loaded in the aft part of the ship, and there was about 250 pounds of pig iron which makes me arrive at a total of 1000 tons.

Q. Now, how do you get these figures, from memory or from looking at this little book?

A. I tallied with the custom house here every day what was discharged from the ship, so for the second time I verified that there was 750 tons of general cargo in the 'tween decks and about 250 tons of pig iron.

Q. Then I understand he is giving it from his memory?

A. From memory, certainly,—because my memory is good enough to remember it after I have footed it up several times since loading.

Q. You did not make these books yourself?

A. I said that they had been made by the tally clerk and signed by him.

Q. When you were being examined by Mr. McCamant about the cargo why did not you say you had these books?

A. Because it did not seem necessary for me to say so.

Counsel for libellant asks the notary to mark the book produced by the witness for identification, and the same is marked as requested, with the words “Marked for Identification Ex. G. A. B.”

Q. On this plan of the loading, the plan is in ink and then there are certain marks in pencil,—when were the pencil marks put on it?

A. I as first mate did this plan in pencil, and I afterwards went over it with ink, but as I am not an expert in designing some parts have not been traced over.

Q. When did you make it?

A. In Antwerp.

Q. This plan only shows certain merchandise but does not show weights, does it?

A. When I made up that plan I made it with the strict idea that it would only serve my own purposes, and I had not the slightest idea that it would ever be introduced as evidence.

Q. It does not state weights, does it?

A. I believe the weight of the pig iron is on it, but as far as the estimate is concerned, I do not know,—it is merely to know where the different things were put in case the stevedores here in Portland would ask me where a certain cargo was I could tell them, and so at the same time give an approximate idea of how much there was.

Q. Referring to Exhibit "A," what are these figures down here in the stern near the keel "40 P"?

A. That means about 40 tons of Cleveland pig iron.

Q. What are these figures in the 'tween decks, what are they?

A. They refer to what I said a little while ago, that there was 300 tons of pig iron,—there was 40 tons of pig iron put forward here, and about 10 tons put here (showing), and about 250 tons of pig iron in the 'tween decks.

Q. Did you do any calking of the deck on the voyage out from Antwerp?

A. We caulked part of the poop deck, and the apartments aft.

Q. How much of the poop deck?

A. About three quarters of it.

Q. When did you do this?

A. I should have to consult the log book about it, because it is marked in there.

Q. State approximately what part of the month?

A. I believe during the month of April, when the weather would permit it.

Q. What part of the month of April?

A. It must have been the latter part of March, or the early part of April, because on the 18th of April the bad weather commenced.

Q. Did you do any caulking here in Portland?

A. Yes, the deck has been caulked here.

Q. How much?

A. The entire deck was caulked.

Q. The main deck?

A. Yes, the main deck.

Q. Did you caulk any of the main deck on the voyage out?

A. No.

Q. When was the worst weather that you had,—before you reached Hobart, or after you left?

A. The worst weather we had before arriving at Hobart.

Q. Was this wave that pooped the ship and carried the men away, was that during the worst weather that you had?

A. About a week after we had this storm on the 6th of May, we had a tremendous gale, which was more serious as regards the straining of the ship.

Q. A single great wave is often encountered, but that does not necessarily mean that it is unusually bad weather, does it?

A. It is quite possible that the sea may be very high and a great swell going and the weather be very calm.

Q. What I want more particularly is, do you not measure a storm by any one particular heavy wave

that is shipped,—you can have one great wave and it would not mean that the storm necessarily was anything unusual?

A. I do not think I understand.

Q. I mean this: No sailor because he encounters an unusually high and heavy wave would say from that that it was a heavy storm?

A. No, we do not call when there is only a strong, long swell and a high sea, the water does not come on deck, therefore you could not consider it a storm, but it is more severe for the straining of the ship.

Q. How many people did you say were on the poop deck on the 6th of May when you shipped that sea?

A. I said before that were eight on the poop deck.

Q. Two men were at the wheel?

A. Yes, two at the wheel, and two others ready to assist, and the second mate and second boatswain besides two other men.

Q. One of the two other men was the carpenter, was it not?

A. Yes.

Q. What was he doing up there?

A. He was there also to give assistance in case the other men would not be able to handle the wheel.

Q. Then there was four men there?

A. The carpenter was one of the two men that were standing near the man at the wheel to give assistance.

Q. Now, there were two men on duty at the wheel?

A. Yes.

Q. And two ready to render assistance to them?

A. Yes.

Q. One of those who were ready to give assistance was the carpenter?

A. Yes.

Q. And the other one was the second officer?

A. The second boatswain.

Q. The second boatswain?

A. Yes.

Q. What were they doing?

A. They were on their watch.

Q. They were on duty?

A. Yes.

Q. What was the name of the two other men?

A. Riou and Stener.

Q. What were they doing?

A. They were on duty in case they had been told that they were needed, that was the only place they could go during a storm.

Q. What duty could they do?

A. It makes no difference what he does as long as it is bad weather. Half of the crew must be on deck.

Q. They were on the watch?

A. Yes.

Q. I thought you said something about them being there for shelter, what did you mean by that?

A. They were on deck and they naturally went in the place which would best protect them for their safety. In such weather it is not very pleasant to be outside and run the risk of being blown overboard.

Q. They were on the poop deck?

A. Yes, they were on the poop deck.

Q. How deep were you loaded at that time?

A. I have not put in that.

Q. How much free board did she have amidships?

A. 45 centimeters.

Q. How high was the bulwarks above?

A. About 43 or 44.

Q. How high was the bulwarks above the main deck amidships?

A. About 4 feet; I have never measured the exact distance.

Q. On the 6th of May you were running before the wind, were you?

A. On the 6th of May, of course, we have run before the wind; we had no engine on board.

Q. You always have to run before the wind?

A. 48 hours afterwards the weather improved so they did not have to run with the wind regardless of the steerage.

Q. 48 hours afterwards,—I am talking about the 6th of May?

A. In about 48 hours the weather improved.

Q. Then as I understand it, he has not answered my question,—on the 6th of May he was running before the wind, as we say in English, or as he says with the wind,—he was running with the wind on the 6th of May?

A. Yes, on the 6th and 7th of May we ran with the wind.

Q. What sail was he carrying on the 6th of May?

A. We carried the lower topsail, the foresail and the main upper top sail.

Q. Did you carry any jib or stay sail?

A. Two lower topsails, foresail and main upper topsail.

Q. No jib?

A. No,—that was all we could stand.

Q. When did you shorten sail to that amount?

A. We have taken in sail according to the strength of the wind, and then we had these four sails from six A. M. on May the 6th until the next morning.

Q. Then what sail did you have?

A. When the weather came gradually better we increased the sail.

Q. What time was it you had this worst storm which you say was worse than the 6th of May?

A. About eight or ten days afterwards, as I have mentioned before.

Q. That is the nearest date you can give?

A. Yes, if I should refer to my log book I could tell.

Q. How long did that last?

A. About 24 hours.

Q. Do you remember what sail you carried then?

A. I do not remember that, but I know we had the two lower topsails, the foresail, the main sail and jib, but I only mention those from memory. By referring to my log book I could tell. (Witness refers to log book). The correct date is May the 12th, and we carried the foresail, two lower topsails, one jib and a main stay sail,—the main stay sail was carried until it was

carried away.

Q. Were you driven out of your general course during this storm, or did you hold your general course?

A. It was impossible to flee before the wind because the wind and sea were crosswise; if we had fled before the wind the sea would have swamped us down.

Q. What I mean is, did you keep your general course towards Hobart?

A. We stopped our course, but kept as close to the wind as possible.

Q. I am not talking about the wind, I am asking whether you kept on your general course towards Hobart?

A. No, they did not follow their course.

Q. For how long a time were they off their course?

A. About 24 hours afterwards. The next morning between eight o'clock and nine, they continued on their course.

Q. At that time they resumed their course?

A. Yes, continued their course.

Q. What is the tonnage of the Babin Chevaye?

A. That is a thing which I am not very familiar with, how much registered ton she is.

Q. How much dead weight does she carry?

A. About 3000 tons,—those are the figures which I cannot give correctly.

Q. Would you say that she was fully loaded this voyage?

A. Yes, had an entire cargo on board.

Q. What part of the ship was it that this stanchion

was broken on the 6th of May?

A. On the port side off the main hatch.

Q. I understand it was a stanchion in the 'tween decks?

A. No, I think you are mistaken.

Q. Let me understand how much of a hole that was,—how much did it let in?

A. After the rivet had broken off there was a hole, but how much water went down I do not know.

Q. What size was the hole?

A. About three quarters of an inch.

Q. 12 milimeters?

A. Yes.

Q. What damage was done to the chart room,—you say the wall was stove in, do you mean the door?

A. The door was splintered up and the inside wall likewise,—the partition between the staircase and the chart room was smashed up.

Q. Then the water went down the staircase into the salon?

A. Yes, that is right.

Q. How soon did you get that repaired?

A. Immediately I got four or five boards together so as to nail it up.

Q. Which way does the chart room open,—that is the door, fore or aft,—does the door face forward or face aft?

A. The door slides.

Q. Does it face aft or face forward, or starboard or the port side?

A. It faces aft.

Q. What part of the ship is it in?

A. On the poop deck, about two feet behind the middle mast.

Q. How far from the well?

A. From 16 to 20 feet.

Q. This water that went down the stairway into the salon, where would it find its way into the hold and 'tween decks, what part of the hold or 'tween decks would it find its way into?

A. It is hard for me to tell how it did go into the hold, but we all thought it went through the sail room and also through the store room, because several provisions were damaged.

Q. That would be all aft, would it not?

A. Yes, all aft.

Q. The sails that you dried were spare sails that you had stored in the sail room?

A. Yes, the sails were in the sail room, which is also aft.

Q. He said he dried out a lot of sails after the water had wet them,—they were spare sails that were in the store room?

A. Yes, the sails that were in the sail room were all brought out to be dried.

Q. How soon after the storm?

A. It is impossible to dry sails from the sail room during the trip, because they all would have blown overboard.

Q. They were dried out when you got to Hobart?

A. Yes, at Hobart.

Q. How many times have you been around the Horn?

A. Three times by Cape Hope and three times by Cape Horn.

Q. How many years at sea?

A. Nineteen years.

Q. Did I understand you to say that this was the worst weather you ever saw?

A. Yes, indeed it was.

Q. Do you refer to these two particularly heavy storms, or to the whole voyage?

A. Especially with regard to those two heavy storms we had, and also as regards the number of days,—I never saw so many during a certain period.

Q. A ship is strained most by rolling, is not she?

A. A ship is strained not only by the rolling but by all the different conditions of rolling and pitching.

Q. I am not asking about this ship, I say, a ship is strained most by rolling,—when the wind is in her sails it tends to steady her?

A. As a rule the rolling of the ship strains her considerably, but there are other conditions which often make it strain just as well.

Redirect Examination

(Questions by Mr. WALLACE McCAMANT):

Q. When did the rivet come off of this stanchion, do you know?

A. This rivet parted after the storm of May the 12th.

Q. What caused it to part?

A. The cross sea.

Q. What is a cross sea?

A. The seas cross when they come from two different directions.

Q. What would have happened had the vessel kept strictly on her course during the storm of May 6th and May the 12th?

A. She would have gone over.

Re-Cross Examination.

(Questions by Mr. C. E. S. WOOD):

Q. The Babin Chevaye is a steel ship, is she?

A. Yes.

Q. Where built?

A. In Nantes.

Q. When?

A. 1901.

Redirect Examination.

(Questions by Mr. McCAMANT):

Q. Were there any empty spaces in the cargo, or in the hold?

A. Between the two bulkheads on either side of the hold there was a distance above the cargo in the 'tween decks of six feet, and in the 'tween decks from the after hatch up to and past the main hatch where the ochre was stored there was a distance opened from two to three feet,—a person could just crawl through it, but from that place where the ochre was stored as far as the forward hatch there was about the space of two feet left.

Q. Over the deck?

A. Up over the deck.

(Witness excused).

F. M. GRENAPIN, called as a witness for the defendant and claimants, being first duly sworn by the interpreter, testified as follows:

Direct Examination.

(Questions by Mr. WALLACE McCAMANT):

Q. State your name, age and residence and occupation?

A. F. N. Grenapin; age 30 years old; residence Musquer, France,—seaman.

Q. What position, if any, did you hold on the Babin Chevaye?

A. Second boatswain.

Q. How long have you followed the sea?

A. Sixteen years.

Q. How long have you been with the Babin Chevaye?

A. Eight months,—since we left Antwerp.

Q. Describe the weather on the voyage after the 18th of April, 1909?

A. I can give a description more or less, but to the best of my memory it is this, that it was very bad weather.

Q. Describe the weather on the 6th of May?

A. On the 6th of May we took in the lower top gilliant sail—the wind became stronger, the sea very high and rough,—the wind still became stronger,—the sea became still higher,—the second mate, Mr. Collet, sent

me to see if the hatches were properly secured at the corners,—there are three hatches, one two and three. At three twenty P. M. I reported that nothing had moved. At 3:30 he sent one of the seamen to look out. Shortly after that a big wave hit the ship aft. I was with the second mate on the starboard side. I said to him "Look at that big wave ahead of our ship." I was standing next to Gallen, one of the men at the wheel; just when I had finished making my remark the wave hit the vessel and destroyed the wheel box, and sent the two men at the wheel flying over the poop deck, the second mate, the carpenter and the other ordinary seaman also, while I was standing near the two men at the wheel I had my hand on the wheel, and therefore at once seized it to hold the ship in place, and when I recovered from the first shock I saw the door of the chart room smashed in, as the wave was stronger on the port side than on the starboard side. The wheel box was carried over to the starboard side and its position prevented the wheel from being properly operated. I had to take it down entirely in order to free the wheel. Soon afterwards I called for two men to replace me. I then found the second mate on the starboard side near the poop ladder. He told me one of his legs was broken. In the meantime the men off duty were called on deck at once, and I ordered that Mr. Cullet be at once taken to the salon. The other injured men were likewise taken downstairs. We placed on the poop deck lines or ropes so as to pass along afterwards safely. Then it was ordered

that oil be thrown forward of the ship during 48 hours.

Q. State whether the storm continued during all those 48 hours?

A. The storm lasted until 24 hours after this wave came on board the ship.

Q. Was the deck under water any portion of that time?

A. Yes, it was impossible to be out on deck.

Q. State whether the damage done by this wave particularly in staving in the chart house door and partition, let the water into the hold onto the cargo?

A. Yes, there is no doubt of that, and also some stanchions were broken on the port side.

Q. Would would be the effect of breaking the stanchion with reference to letting water down into the hold?

A. It would be hard to tell how much water would go down through the stanchions, because it is pretty solid.

Q. What caused the stanchion to break?

A. The big sea.

Q. What was done with reference to repairing the stanchions and how soon was it done?

A. Yes, they were repaired as soon as it was possible to get out on deck.

Q. What was done with reference to the damage to the chart house and making the deck tight at that point, —I mean fixing it so the water washing over the deck would not go down through the stairway at that point?

A. Yes, the first mate immediately made a temporary door,—a sliding door.

Q. How much water went through the deck and down the stairway before those repairs could be effected to the chart house?

A. I do not know, because I had more important things to do than to watch how much water went down there.

Q. Describe the storm of May the 12th?

A. I remember that on the 12th of May we did not continue on our course, but laid still, or at least, turned with the waves, the sea was very high then.

Q. State whether the sea was washing over the decks at that time?

A. Yes, it was impossible to be on deck.

Q. What, if any, damage did that do to the stanchions of the vessel, or any of them?

A. I do not remember exactly whether the stanchions were broken on the 12th of May, but it was during one of these storms, but I would not be certain which.

Q. How did the weather on this voyage compare with other severe weather that you have experienced on other voyages?

A. In all my 16 years of navigation I never saw such bad weather, and so long bad weather.

Q. What was done when the ship got to Hobart in the way of repairs?

A. Yes, we removed the cement around the stanchions and repaired the rivets, and bolts down below

the deck, and then let water run over the deck so as to examine into the places where water would come through where there were leaks.

Q. When the leaks were discovered what was done?

A. They were repaired.

Q. Were all the leaks repaired?

A. Yes, all the leaks were repaired.

Q. What was done during the voyage from Antwerp to Hobart with reference to the care of the cargo?

A. As soon as the weather would permit the captain himself sent the first mate down into the hold to see if any barrels needed rewedging and resecurings. Sometimes some of the barrels would get slightly loose and they were resecured again, but not many.

Q. How long were you at Antwerp before the vessel left?

A. Fifteen days before sailing.

Q. What sort of examination was made of the vessel at Antwerp with reference to her being tight, staunch, strong, seaworthy?

A. I do not know that.

Q. What was the condition of the vessel when she left Antwerp?

A. It is hard for me to tell what condition the ship was in. When we went down the river the vessel seemed to be all right, and navigable, but one cannot tell until you get outside, until the ship is navigable or not.

Q. What sort of weather did the vessel have from Hobart to Portland?

A. The weather was not very favorable most of the time,—bad weather.

Q. What was the effect of the bad weather with reference to the straining of the vessel?

A. The weather from Hobart to Portland was not as bad as that from Antwerp to Hobart, but nevertheless the vessel suffered some straining.

Q. Did the vessel strain more in going from Antwerp to Hobart than she did from Hobart to Portland?

A. According to my own idea the vessel strained more from Antwerp to Hobart than from Hobart to Portland.

Q. Was any change made at any time in the voyage from Antwerp to Portland in the stowage of the cargo? As to its distribution between the 'tween decks and the hold?

A. No, because it would have been impossible to remove anything from the hold as everything was covered up.

Cross Examination.

(Questions by Mr. C. E. S. WOOD):

Q. The floor of the salon is really the deck, is it not?

A. Yes, it is the same,—on the same level as the deck.

Q. It is the deck, is it not?

A. Yes, it is the same deck,—it corresponds with the other.

Q. How would water getting into the salon get down into the cargo if the deck was tight?

A. Around the salon at the bottom of the staircase are several doors which are not hermetically closed, and therefore water went also in the sail room, and in all

the other rooms adjoining the salon.

Q. Why does he think that the water than went down through the chart room into the salon when the big wave pooped the ship went into the 'tween decks or hold; what is his reason for thinking so?

A. He does not understand.

Q. You said that when the big wave broke the chart house the water undoubtedly went down into the hold, did you not?

A. I do not understand.

Q. When the water came down the staircase it landed in the hold, did not it?

A. Yes, that is right.

Q. Now, the 'tween decks and hold are both below the salon?

A. Yes.

Q. How did the water get from the salon lower down into the hold?

A. It also went into the store room.

Q. As a matter of fact, the crew were all down in the salon bailing water out, were they not?

A. Yes, all those of the crew that were not injured were put to work to bail out the water from the salon and other rooms.

Q. You spoke of a stanchion being broken in the ship. Where was that stanchion?

A. About in the center of the ship on the port side. It should be understood it was not a stanchion that was broken but a rivet.

Q. Was it near one of the hatches?

A. It was near the main hatch.

Q. On the port side?

A. On the port side.

Q. That was the only one that was broken, was it not?

A. I think there were two or three that were changed.

Q. But you are not sure whether it was during the 6th of May or the 12th of May storm?

A. No, I do not know when it was.

Q. You said it was in the storm of the 6th of May first, but then after that said it was in the storm of the 12th of May??

A. I do not remember exactly, but I believe it was on the 12th, because the vessel strained on that day more than on the other day.

Q. If there was more than one broken, where was the other situated?

A. Also on the port side.

Q. The same place?

A. Yes, following the other.

Q. You are sure there was more than one?

A. Yes, there was more than one, but I have not counted them.

Q. Are you a Bretton,—from Britainy?

A. No, Monsieur.

(Witness excused).

DISTRICT OF OREGON—ss.

I, Geo. A. Brodie, Notary Public and Examiner in Chancery of the above entitled Court, do hereby certify that on the 18th day of October, 1909, at the hour

of 2 o'clock P. M. of said day, the parties in the above entitled suit appeared before me in the City of Portland, County of Multnomah and State of Oregon pursuant to agreement, and it was thereupon stipulated and agreed by and between the parties, the libellant appearing by Mr. C. E. S. Wood, their proctor, and the defendant and Claimants appearing by Mr. Wallace McCamant, their proctor that the testimony of the witnesses M. A. F. Rehel, F. M. Grennappin and J. Lebaupin, should be taken on behalf of the defendants, and that such testimony should be taken down by me in shorthand and afterwards transcribed into typewritten script and certified to be correct by me and that when so taken and certified said depositions of said respective witnesses should be received in evidence without the signature of the respective witnesses, the reading and signing of said depositions by the respective witnesses being expressly waived. That in pursuance of said stipulation and agreement the depositions of said witnesses were thereupon taken by me upon said day and upon the 19th day of October, 1909, as stated in the transcript of the depositions of said witnesses hereto attached. I further certify that before proceeding with the taking of the depositions of said witnesses they and each of them were duly sworn by me through J. W. Matthes, Interpreter, to tell the truth, the whole truth, and nothing but the truth, in answer to interrogatories to be propounded to them respectively by proctors for the respective parties.

I further certify that the foregoing is a full, true and correct transcript of the testimony of said witnesses respectively, and of the whole thereof as taken down by me in shorthand at the time and place aforesaid.

In witness whereof I have hereunto set my hand and Notarial seal this 7th day of February, 1910.

GEO. A. BRODIE,

Notary Public for Oregon, and Examiner in Chancery.

[Claimant's Exhibit 5.]

OATH OF MASTER TO MANIFEST OF ENTRY
COASTWISE DEPARTMENT OF COM-
MERCE AND LABOR BUREAU OF
NAVIGATION.

I, Jos, Lebeaupin, Master of the vessel called the Bab-in Chevaye of Nautes, do swear that the original manifest which I now exhibit contains a true account of the articles composing the whole cargo of the said Fr Bk which now are or at any time have been on board the said Fr Bk from the time of her departure from the Port of Antwerp, from whence she first sailed, excepting and that no part thereof has been landed therefrom, excepting

G. LEBEAUPIN,

Master.

MEYER, WILSON & CO.

Columbia No. 1.

Port of Portland, Oregon.

Sworn to and subscribed before me this Aug. 23, 1909.

R. F. BARNES,

S

Collector.

Filed Apr. 9, 1912. A. M. Cannon, Clerk U. S. District Court.

[Claimant's Exhibit 6.]

TRANSLATION.

February 9th, 1909.

At the request of Captain Lebeauvin, commanding the French Bark "Babin Chevaye" and by virtue thereof domiciled on board of the same, moored in the Port of Antwerp,

WHEREAS in accordance with a certain verbal agreement of Charter made between the parties interested, the parties hereinafter mentioned have loaded on board of the vessel of the plaintiff among other merchandise, certain cargo of iron, and,

WHEREAS under these conditions the plaintiff only intends to sign the Bills of Lading relating to the said irons in sofar as they contain the clause "IRONS STAINED WITH RUST"

I, the undersigned, Leon Schuermans, sheriff of the Courts in the first instance and of Commerce, sitting at Antwerp, residing in this city at 23, Canal des Re-collets.

Have told and notified Messrs. Wilson, Meyer & Co., charterers, residing at Liverpool that the plaintiff has demanded several times to submit to his signature Bills of Lading containing the clause "irons stained with rust," and that he will hold them responsible for any and all consequences resulting from any delay caused or to be caused by withholding the said documents and particularly of the demurrage of the Bark "Babin

Chevaye" which will be claimed in accordance with her rights, protesting in this respect to this charge by rights.

Without any reserves.

And for fear they ignore the same, I have given them the duplicate copy of this original served upon them at their chosen residence in Antwerp, acquiesced and declared valid by and through their agents, Messrs. Fred. Hall Johnstone & Co. residing in this city at 3, Quai Van Meteren.

(Signed) L. SCHUERMANS,

[Claimant's Exhibit 8.]

UNITED STATES OF AMERICA.

State of Oregon

City of Portland

County of Multnomah

By this public Instrument of Declaration and Protest, be it made known and manifest to all whom it may concern, that before me, P. A. Ganty a Notary Public in and for the County of Multnomah in the State of Oregon, duly commissioned and sworn, and practicing in the City of Portland, State aforesaid, personally appeared J. Lebeaupin Master of the French Ship "Babin-Chevaye", of the burthen of about 1930 tons, and requires me to extend his protest (the said Master having previously noted in due form of law his intention to protest) and together with him come and appear M. A. F. Rehel 1st Mate, A. F. Viaud, 1st boatswain, F. M. Grenappin, 2nd boatswain, all belonging to the aforesaid vessel, all of whom being by me severally, duly and

solemnly sworn on the Holy Evangelists of the Almighty God, voluntarily and freely depose that the said vessel laden with General Cargo being in every respect seaworthy, and in all things fitted and provided for her intended voyage, sailed on the 16th day of February 1909, from Antwerp bound for Portland, Ore., via Hobart-Town, Tasmania.

18 Feb. 9:30 p. m. Anchored in the roads of Cherbourg for stores.

20 Feb. 6:30 a. m. Left Cherbourg.

Nothing worthy of note occurred until

18 Apr. Sea very rough. The swell increases. Heavy rolling, straining very much masts and rigging. The deck constantly flooded by high seas washing over.

29 Apr. Sea constantly breaking over the vessel.

1 May Sea very rough, heavy rolling of the ship causes fear for the safety of the cargo. The decks forward constantly swept by the waves. Necessary precautions are taken on account of the bad weather. Weather thick. For the past 24 hours the barometer goes down, since noon 2 degrees every hour and stands at 744 at 7 p. m., the aneroid at 758. Almost calm since 4 p. m.

2 May Sea hollow. At 1 a. m. the barometer remains steady. Heavy swell. Wind shifts from N. to N. W. At 9:30 a. m. the wind jumps to S. W. and suddenly freshens. The decks are constantly covered with waves. Pumps clear.

- 3 May Fine weather. Sky overcast. Wind decreases.
- 4 May At 5 p. m. weather becomes squally, rain and hail. The wind freshens and is blowing a gale at intervals.
- 5 May Lower deck constantly filled with water shipped on starboard and portside, decks flooded. At 5 a. m. weather improves, squalls less frequent. At 1 p. m. a strong gale. Heavy rolling. Forward part constantly flooded. From 4 p. m. to 6 p. m. a storm blows. The seas break over the vessel from one end to the other. Steering with the waves to avoid accidents. At 6 p. m. the wind decreases. Sea very rough. Decks constantly flooded. At 11:30 p. m. a storm blows. Barometer at 732.
- 6 May 1 a. m. very severe squalls. Sea very high. The entire deck constantly flooded. At 7 a. m. the breakwater of the main hatch is carried away. Vessel straining heavily. The sea is tremendous. Pumps clear. The vessel shakes from stem to stern at every sea shipped. At noon it is impossible to remain on deck. Early in the morning the barometer slowly sinks to 728. At 8 a. m. the wind increases in velocity, severe squalls, the sea is awfully high, steering with the waves. On account of the force of the shocks, the lower deck is constantly filled with water to the height of the bulwarks, the excess

running off on both sides over the mainrail. In spite of this the vessel answers her helm. A single spoon-drift is shipped on the poop deck during a more severe squall about 11 a. m. After the gale at noon, the weather gets a little better, the squalls become less strong. Still going with the waves at a speed of $10\frac{1}{2}$ knots an hour. At 3:25 p. m. the vessel is struck from behind by two waves, the first one lifting her bow up in the air and while the stern was away down, the second wave which was simply tremendous and literally a mountain of water, the crest of which was at least 30 feet above the railing, landed on top of her. According to the deposition of the AB Riouitt, extended from the foot of the mizzen mast and over and above the chart room on the poop deck. The coxswains Jaoien and Gallen were at the wheel. The officer of the watch Collet stood near to superintend them, the second boatswain Grenappin, stood on the look-out near the compass, the carpenter Quellen and the ordinary seaman de Fur, seated on the watch bench and ready to come to the assistance of the two coxswains. The AB Riou and Steuer stood protected forward of the mizzen mast. The stanchions aft on the poop deck are bent or broken, the wheel-house is smashed, the wheel badly damaged, the grating on the portside is torn away. The door of the

chart-room is smashed in and through the force of the intrushing water the inside wall is smashed, the chart-room is full of water, everything inside, charts, nautical instruments, etc., were either damaged or lost. The water rushed down stairs, flooded the cabin and made most of the sails wet and damaged some of the provisions in the store room. This tremendous wave finally collided with the forecastle after having filled the lifeboat forward and damaged the rivets in the bottom. It is impossible at this time to estimate the extent of the damages, the two coxswains Jaouen and Gallen were torn away from the wheel, the second boatswain Grenappin who could hold on to the binnacle, jumped to the wheel and was able to maintain the ship which was already heaving to, while the AB Riou comes to replace him at the wheel assisted by AB Steuer. The coxswain Gallen was thrown head foremost against the rack on the poop deck on starboard. He was afterwards picked up with fractured forearm and severe internal injuries. The boatswain Collet was swept from one side to the other of the poop deck and finally seized the bannister of the poop ladder. He was picked with his right leg broken in two places. The carpenter Quellen thrown violently against everything there was in his way but was fortunately caught

by the AB Riou when his two legs were already overboard. His jaw completely smashed, suffered terribly and is internally injured. Immediately afterwards a roll call was held. The AB Francois Jaouen and the ordinary seaman Venant Marie Le Fur had been carried overboard by this tremendous sea and nobody has had any knowledge of it at the time. It was then 3:30 p. m. and the unfortunate men were already far behind. Under the circumstances and on account of the condition of the sea and the force of the wind rescue was impossible. After a consultation with the crew it was unanimously decreed that under the circumstances no other steps could be taken than to flee before the wind and that any maneuvers to their rescue would result in the doom of the ship. As a last resource the Captain ordered to throw oil which was continued until there was a noticable change for the better. After the accident by 8 p. m. the entire crew was called together and the AB Viaud was unanimously pronounced officer of the watch doing duty as second mate

7 May Sea very rough. Wind W. S. W. The spilling of oil is continued. At 5 a. m. the weather gradually improves and the sea quietens a little. It is still impossible to keep our course. What remained on deck is picked up and the water is being bailed out from

the apartments aft. At noon it is possible to steer on our course. Seas are still breaking over the ship on starboard and on the portside. At 1 p. m. fine weather. Less water shipped. Repairs made to the rigging and the masts inspected.

8 May Sea very rough. Heavy rolling, straining considerably masts and rigging. The deck is constantly flooded. Squally. For the safety of the ship it is necessary to steer with the wind. First time water in hold. The pumps show the presence of 2 inches of water in the hold.

9 May Weather improves. Vessel straining through the severe rolling. Pumps clear. In the afternoon good weather, but rolling and straining continued. At 9 p. m. the vessel rolls terribly.

10 May Severe rolling. Fears are entertained for the safety of masts and rigging. At 5 p. m. as soon as the weather would permit of the opening of a hatch an inspection of the hold is made and 5 barrels of cement are found adrift, besides several leaks in the weaker parts of the ship.

12 May At 11 a. m. the decks are swept from stem to stern. Violent rolling and straining of the ship. At 1 p. m. awful weather. High seas taking the ship sideways, straining and shaking her tremendously. The lower deck constantly full of water up to the railing. At 9 p. m. the storm increases in violence. The

canvas of the lifeboats and the third tarpaulin of the main hatch are caried away, also the railing of the poop ladder and the cover of the manhole of the pump well. The port-side of the deckhouse is stove in at least 2 inches.

14 May Decks remain flooded. Sea rough. As soon as it was possible to go on deck the captain and the officer of the watch make a thorough examination. The cement of the stanchions from the main hatch to the small deckhouse was broken and the stanchions slightly twisted. One rivet completely gone, causing thereby a considerable leak. Temporary repairs are made with a wooden plug. As soon as more water is found in the hold the main pumps are worked constantly. At 6 p. m. pumps clear. As the water was moving constantly it was impossible to work the pumps. An inspection of the hold revealed several leaks resulting from the severe straining of the ship.

20 May Sea very rough. With the exception of short intervals the weather was generally very bad up to this day and most of the time the decks were flooded and vessel rolling heavily on account of the tremendous swells. At 5 a. m. the weather becomes gradually better, the sea improves. The decks are less frequently covered with water. As the water in the hold does not increase it is evident that

the vessel did not make water, but that it came from the leak as a result of the straining of the ship. Nothing worthy of note occurred until

- 29 May When at 5:30 p. m. the pilot from Hobarttown is taken on board to enter the river. On account of the wind vessel is obliged to anchor.
- 30 May Arrived at Hobarttown at 11:30 a. m. Mr. Collet and the carpenter Quellen, are sent to the hospital ashore.
- 31 May The AB Gallen is also sent to the hospital. The ship's mechanic repairs the broken rivets of the stanchions on the portside.
- 1 June Some of the barrels in the 'tween deck are being rewedged and restowed.
- 5 June Vessel leaves down the river and continues her voyage to Portland, Oregon.
- 9 June Sea very rough. Decks constantly flooded. Severe rolling.
- 10 June Sea very rough. A gale is blowing. Vessel straining considerably through the pitching and rolling. Impossible to stay on deck.
- 11 June Weather good. Wind jumps from S. S. E. to N. W. In visiting the hold, it is discovered that 2 deck-beams in the 'tween decks on the portside aft of the main hatch are broken.
- 1 July Although nothing extraordinary has happened in the meantime most of the time the decks were swept by the waves, accompanied by frequent pitching and rolling and strain-

ing the ship. From this day on the weather became very much better, and nothing worthy of note occurred until

20 Aug. At 11 a. m. the Columbia River pilot is taken aboard and in tow of the tug "Wallula" vessel anchors at Astoria at 4 p. m.

23 Aug. Vessel arrives at Portland and makes fast at Columbia Dock No. 1.

AND the said deponents on their oaths declare, that the said vessel was at the commencement of the voyage aforesaid, staunch and strong, and had her cargo well and sufficiently stowed, and her hatches properly closed and secured; and that during the said voyage they, together with the rest of the crew on board, used their utmost endeavors to preserve the said vessel and her cargo, tackle and apparel from damage or injury. And that any loss, damage or injury which has arisen or accrued, or that may arise or be sustained, in any way or manner whatever, is solely owing to the accidents and difficulties herein set forth and declared, and not to any negligence, want of skill, vigilance or exertion on the part of the deponents, or any of the officers or men of the said vessel.

Master, J. LEBEAUPIN,

M. A. F. REHEL,

Seamen,

A. F. VIAUD,

F. M. GRENAPPIN.

WHEREFORE, the said master and commander as aforesaid, hath requested me to Protest, and I, the

said Notary, at such his request have PROTESTED, and by these presents Do Publicly and Solemnly Protest, against all and every person and persons whom it doth, shall or may concern, and against all and singular the accidents, casualties and circumstances already set forth in the foregoing declaration, on oath, for all manner of losses, costs, damages, charges, expenses and injuries whatsoever, which the said vessel and her cargo on board and the freight by her earned, or to be earned, or either of them or any part thereof, have already sustained, or may hereafter sustain, ¹ reason or means of the foregoing premises.

THUS DONE and PROTESTED in the City of Portland this Eleventh day of September in the year of Our Lord one thousand nine hundred and nine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Notarial Seal.

[Seal.]

P. A. GANTY,

Notary Public in and for the State of Oregon.

Filed Apr. 9, 1912.

A. M. CANNON,

Clerk U. S. District Court.

[Claimant's Exhibit 9.]

*In the District Court of the United States for the
District of Oregon.*

GEORGE H. C. MEYER ET AL.,

Libellants,

vs.

THE BARQUE BABIN CHEVAYE,

Defendant,

BUREAU FRERES AND BALLERGEAU,

Claminant.

It is hereby stipulated that the claimant is a corporation organized and subsisting under the laws of the Republic of France, and that this stipulation shall

stand in lieu of proof of this fact.

WILLIAMS, WOOD & LINTHICUM,

Proctors for Libellants.

Filed Apr. 9, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And Afterwards, to wit, on the 14 day of June, 1912,
there was duly filed in said Court, a Notice of
Appeal, in words and figures as follows to wit:

[Notice of Appeal.]

*In the District Court of the United States for the
District of Oregon.*

THE BARQUE "BABIN CHEVAYE,"

GEO. H. C. MEYER, H. L. E. MEYER, JR., J. W.
WILSON and JOHN M. QUAILE, partners
doing business under the firm name of MEY-
ER, WILSON & COMPANY,

Libellants and Appellants,

vs.

BUREAU FRERES & BAILLERGEAU,

Claimants and Appellees.

NOTICE OF APPEAL.

GENTLEMEN:

You will please take notice that the Libellants
above named hereby appeal from the final decree
made and entered herein on the 29th day of April,
1912, to the next United States Circuit Court of Ap-
peals for the Ninth Circuit, to be holden in and for

said Circuit at the City of San Francisco, California.

Yours truly,

WILLIAMS, WOOD & LINTHICUM,

WOOD, MONTAGUE & HUNT,

Proctors for Libellants and Appellants.

Dated at Portland, Oregon, this 14 June, 1912.

To Messrs. SNOW & McCAMANT,

Proctors for Bureau Freres and Baillergeau.

[Endorsed]: Notice of Appeal. Filed Jun. 14, 1912

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 14 day of June, 1912,

there was duly filed in said Court, Assignments of Error, in words and figures as follows, to-wit:

[Assignments of Error.]

*In the District Court of the United States for the
District of Oregon.*

THE BARQUE "BABIN CHEVAYE,"

GEO. H. C. MEYER, H. L. E. MEYER, JR., J. W.

WILSON and JOHN M. QUAILE, partners

doing business under the firm name of MEY-

ER, WILSON & COMPANY,

Libellants and Appellants,

vs.

BUREAU FRERES & BAILLERGEAU,

Claimants and Appellees.

ASSIGNMENT OF ERRORS.

The above named Libellants and Appellants hereby

assign error to the decree of the District Court of the United States for the District of Oregon in the above named case, as follows:

I.

The Court erred in decreeing that the libel herein be dismissed, with costs to the claimants, or at all.

II.

The Court erred in not decreeing that the claimants pay to the libellants the sum of..... as prayed for in the libel.

III.

The Court erred in finding, contrary to the evidence, that the Barque "Babin Chevaye" was seaworthy at the commencement of the voyage on which the damage occurred for which payment is sought in this action; and particularly in finding contrary to the evidence, that the decks of the said barque were seaworthy and not leaky and the seams not old and rotten at the inception of said voyage.

IV.

The Court erred in finding that the said barque was seaworthy, although it appeared by the evidence of the master himself that a hatch leading from the after-cabin into the hold through the storeroom could not be covered or closed in any event, but in case of the deck houses being carried away would leave an opening for the sea into the hold.

WILLIAMS, WOOD & LINTHICUM,

WOOD, MONTAGUE & HUNT,

Proctors for the Libellants and Appellants-

[Endorsed]: Assignments of Error. Filed June 14, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 14 day of June, 1912, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows to wit:

[Bond on Appeal.]

*In the District Court of the United States for the
District of Oregon.*

THE BARQUE "BABIN CHEVAYE,"

GEO H. C. MEYER, H. L. E. MEYER, JR., J. W.
WILSON and JOHN M. QUAILE, partners
doing business under the firm name of MEY-
ER, WILSON & COMPANY,

Libellants and Appellants,

vs.

BUREAU FRERES & BAILLERGEAU,

Claimants and Appellees.

BOND.

KNOW ALL MEN BY THESE PRESENTS,
That National Surety Company, of New York, a corporation, is held and firmly bound unto BUREAU FRERES & BAILLERGEAU in the sum of two hundred and fifty dollars (\$250.00) to be paid to Bureau Freres & Baillergeau, or their successors or assigns; for the payment of which, well and truly to be made, said corporation binds itself, its successors and

assigns, jointly and severally firmly by these presents.

SIGNED AND SEALED the 14 day of June, 1912.

WHEREAS, Geo. H. C. Meyer, H. L. E. MEYER, Jr., J. W. Wilson and John M. Quaile, doing business under the firm name of MEYER, WILSON & COMPANY, as Appellants, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree of the District Court of the United States for the District of Oregon bearing date the 29th day of April, 1912, and entered in the above entitled suit:

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH that if the above named Appellants shall prosecute such appeal to effect and pay all costs which may be awarded against them as such appellants if the appeal is not sustained, then this obligation shall be void; otherwise the same shall be and remain in full force and effect

NATIONAL SURETY COMPANY,

By J. C. Ainsworth,

Resident Vice President.

And by James McL. Wood,

Resident Assistant Secretary.

Taken and acknowledged this 14 day of June, 1912, before me.

C. H. CHAMBREAU,

Notary Public for Oregon.

This bond approved as to form and amount and sufficiency of surety. Dated Portland, Oregon, June

14, 1912.

SNOW & McCAMANT,

Proctors for Appellees.

[Endorsed]: Bond. Filed Jun. 14, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of June, 1912, the same being the Judicial day of the Regular March, 1912 Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Transcript.]

*In the District Court of the United States for the
District of Oregon.*

No. 5169

June 19, 1912.

THE BARQUE BABIN CHEVAYE,

GEO. H. C. MEYER, H. L. E. MEYER, JR., J. W.
WILSON and JOHN M. QUAILE, partners
doing business under the firm name of MEY-
ER, WILSON & COMPANY,

Libellants and Appellants,

vs.

BUREAU FRERES & BAILLERGEAU,

Claimants and Appellees

Now, at this day, for good cause shown, IT IS OR-
DERED that the defendant's time for printing the
record and filing and docketing this cause on writ

of error in the United States Circuit Court of Appeals Ninth Circuit be, and the same is hereby, enlarged and extended ninety (90) days from this date.

CHAS. E. WOLVERTON,

Judge.

And afterwards, to wit, on the 17 day of August, 1912, there was duly filed in said Court, an Order, in words and figures as follows to wit:

[Order Certifying Up Original Exhibits.]

*In the District Court of the United States for the
District of Oregon.*

MEYER, WILSON & CO.,

Libellants,

vs.

BARQUE BABIN CHEVAYE,

Respondent.

Aug. 17, 1912.

Now, at this day, it appearing to the court that certain exhibits introduced in evidence on the trial of this cause are of such character as to require inspection by the appellate court on the appeal of this cause:

It is Ordered that Libellants' Exhibits B and C, and Claimants' Exhibits 1, 2, 4, 6, 7, and C be certified up by the Clerk of this court with the record in this cause to the United States Circuit Court of Appeals, Ninth Circuit.

CHARLES E. WOLVERTON,

Judge.

IN THE
United States Circuit Court
of Appeals
for the Ninth Circuit.

IN ADMIRALTY.

THE BARQUE "BABIN CHEVAYE."
GEO. H. C. MEYER, H. L. E. MEYER, JR., J. W.
WILSON and JOHN M. QUAILE, Partners
Doing Business Under the Firm Name of
MEYER, WILSON & COMPANY,
Libellants and Appellants,

v.

BUREAU FRERES & BAILLERGEAU,
Claimants and Appellees.

*Appeal from the United States District Court for
the District of Oregon.*

Brief of Appellants

STATEMENT

This is a cause, *in rem*, in admiralty against
the French Barque "Babin Chevaye," for damage

to structural steel and cement on a voyage from Antwerp to Portland, Oregon, by way of the Cape of Good Hope.

The amount of damage claimed in the libel is greatly in excess of that actually proved, by reason of the cement turning out better on re-conditioning than was at first expected, and also because of the rise in market price. The actual damage to be awarded under the proof is \$1,491.-26, with maritime interest from August 23, 1909. (P. 34, record.)

The contention of the libel is that the Babin Chevaye was unseaworthy at the inception of the voyage, in that she was improperly loaded and was too "stiff," causing the vessel to labor and strain at sea. The assignment of error (p. 372 of the record) on which appellants especially feel justified in urging the appeal is that the decks of the Babin Chevaye were at the inception of the voyage unfit for the voyage she was about to undertake:—

1st. In not being properly caulked.

2d. In being structurally deficient in that the main deck was pierced with two small hatchways which could not be battened down or otherwise made water tight. It is true the court below found that "this opening was used many times a day, and it could not have been battened down without great inconvenience to the officers and crew of the vessel and without seriously interfering with their work in navigating her. It was

protected by the poop deck, which was a watertight deck almost as strong as the main deck and much less exposed to water, etc.," but we shall attempt to show that this view is a misconception of the situation; that the warranty of seaworthiness surely means that the main deck is tight structurally and in condition from stem to stern—to resist the attacks of the sea—should all superstructure be swept away. There is only one roof to the ship, that is the main deck. The *Babin Chevaye* was built in 1901. (P. 56.) Preparatory to this voyage she was put into drydock at Antwerp to renew her classification in Bureau Veritas. (P. 54.) Her rivets were examined and just a few aft repaired. She was examined in Antwerp as to her decks by her captain, Lebeaupin, who merely tried the seams with his pocket knife where they looked soft (pp. 55, 95, 98); also by Mr. R. R. Baines, employed by the ship as marine surveyor, who seems to have made much the same inspection as Capt. Lebeaupin, of such portions of the main deck as were clear of cargo (pp. 257, 264); also by E. Garnuchot, surveyor for Bureau Veritas (pp. 305, 310). She proceeded on her voyage, leaving Antwerp February 16, 1909, and arriving in Hobart Town May 30th following (pp. 19, 117). During this period she encountered what is claimed to have been very heavy weather, which is set up as a defense—perils of the sea—but this defense is denied by appellants. These days of alleged stress are

dwelt on in the testimony—which follows the captain's protest (p. 360)—both testimony and protest being based on the ship's log (p. 127). The 6th and the 12th of May were the two worst days of the voyage (p. 96). The captain inclines to the belief that the 12th of May was the worst (pp. 115-116), which is confirmed by the first mate (p. 338) and the second boatswain (p. 355). They all agree that the worst weather of the voyage was before reaching Hobart. The barque arrived at Hobart May 30, and remained there till June 5.

The captain says, taking the voyage as a whole, the bad weather occurred between the first week in April and the first week in June (p. 96). After June 10, both testimony and log agree that the weather was favorable (pp. 96, 367). The barque took a pilot off the Columbia River bar August 20. So that the entire voyage, with a week in Hobart, consumed 95 days (p. 121). This was a voyage of average duration (p. 121).

On arrival in Portland her cargo of cement and structural iron was found to be badly damaged by sea water pretty generally throughout the entire ship. Capt. Hoben, marine surveyor for San Francisco Underwriters' and Wheat Cargo Association of London and San Francisco (p. 167), inspected her and concluded her cargo had been badly distributed, causing her to strain, and that her deck caulking was old and unfit and refused her a certificate for her outward-bound

wheat cargo till her entire main deck had been re-caulked. This being done, she carried her wheat cargo to Europe in splendid condition, as also a return cargo to Portland and again a wheat cargo to Europe—three times around the Horn.

We think the court below will not, when he has heard more of the defenses of sea peril, be so ready to take the mere conclusions and assertions of the master and other interested witnesses. If we are to accept as conclusive the master's assertions on any fact of deck caulking, distribution of load or weather we might as well surrender at once. We intend to show by facts that his conclusive assertions are unreliable. The court will certainly bear in mind that protests against sea damage are extended from the log—and the log is always written up to the fullest height of weather or other incident in order that it may in the future excuse the ship, should a claim be made against her.

The master says (p. 97):

Q. What was the purpose of that protest?

A. To cover damages.

Q. And it is taken from the log, isn't it?

A. Yes.

Q. And you put into the protest the worst weather you encountered, didn't you?

A. Yes.

Q. And in writing up the log at sea during bad weather the master always has in mind damage to cargo and extending a protest, doesn't he?

A. Yes. Whenever I expect damage I always make a protest.

Q. That isn't exactly the point in writing up the log at sea. Doesn't the master or officer writing the log have in view the fact that a protest to cover damages may be made from it?

A. No. None whatever.

We submit this answer is not candid. It is against human nature.

Q. So you don't have any—don't exaggerate the weather any?

A. Not in the least. In fact it is not lively enough to express the real condition.

Q. He can express it livelier now from memory. He has permission to go ahead if he wants to?

A. I could not invent any other words than the French are using for that purpose.

This examination is typical of the case. We repeat that if we are to accept the captain's and officers' mere words as conclusive, we are out of court, for they state their own case at will.

We were not present. We have no means of pitting words against words. The ship has it all her own way, and when the master says the log is not written up with a view to protest, he states what is against human nature and what every one familiar with maritime habits knows is not so. Against mere arbitrary language we shall show that this barque refused to disclose to us, at our formal request, at what time she had last been overhauled and re-caulked; that she made a voyage of average duration; that

the weather was what was to be expected in rounding the Cape of Good Hope. Ships do not sail on mill ponds. Ships expect storms and nothing short of a cyclone or hurricane is unusual in such a voyage. She was pooped by one wave May 6. We shall show it was a mere accidental occurrence, liable to happen under the conditions and without effect on real seaworthiness, or relation to especially bad weather. And we shall show that on her arrival in Portland her seams were rotten, not merely opened by straining but rotten—each and every seam the entire length of the main deck—and that she had to have her entire main deck re-caulked from the after house to the forward house; and that when so re-caulked she made three voyages around the Horn and never damaged a pound of cargo. These facts, we shall contend, speak stronger than mere words.

ASSIGNMENTS OF ERROR

Upon the taking of the appeal herein assignments of error were filed as follows:

I.

The court erred in decreeing that the libel herein be dismissed, with costs to the claimants, or at all.

II.

The court erred in not decreeing that the claimants pay to the libellants the sum of as prayed for in the libel.

III.

The court erred in finding, contrary to the evidence, that the barque "Babin Chevaye" was seaworthy at the commencement of the voyage on which the damage occurred for which payment is sought in this action; and particularly in finding contrary to the evidence that the decks of the said barque were seaworthy and not leaky, and the seams not old and rotten at the inception of said voyage.

IV.

The court erred in finding that the said barque was seaworthy, although it appeared by the evidence of the master himself that a hatch leading from the after-cabin into the hold through the storeroom could not be covered or closed in any event, but in case of the deck houses being carried away would leave an opening for the sea into the hold.

POINTS AND AUTHORITIES

I.

It is elementary, of course, that the "Babin Chevaye" warranted herself to be seaworthy in

every respect and fitted for the voyage she was about to undertake.

Work v. Leathers, 97 U. S. 379, 380.

II.

Neither do the actual facts shown by the evidence constitute in a legal sense perils of the sea exempting the barque from liability for damages.

In "The Compta," 4 Sawyer 375, Fed. Cas. No. 3069, which was an action brought to recover damages for injury to the cargo, the defense set up in the answer was "perils of the sea."

The court, in discussing the evidence, said:

"The log book shows that the ship experienced weather of very considerable severity. On the 28th of October the log book notes 'terrific squalls of wind and rain, high confused sea, flooding the deck at times.' On the 27th of November it notes: 'Eight a. m., frightful sea with terrific squalls, with hail and rain, flooding decks fore and aft; noon, squalls taking off, but still a heavy sea.' The deck appears to have been frequently flooded, and 'high, confused seas, heavy seas, heavy swell,' are constantly mentioned. On four occasions the record notes 'heavy head-sea, causing ship to pitch hard.' 'Heavy head-sea, ship pitching heavily.' 'Heavy head-sea, causing ship to go bows under.' 'Ship driving heavily.' But it is to be observed that the log book nowhere records any serious disaster to the ship, unless

the springing of the head of the mizzen-top-gallant mast be so considered. * * * * She is once or twice mentioned as 'rolling heavily,' but throughout the voyage she is not once spoken of as straining or laboring in the seas. On the 13th of December, when the log book states that a heavy head-sea caused the 'ship to go bows under, filling decks fore and aft,' she appears to have been under top-gallant sails, and the entry contains the note: 'Ship behaving well.' * * * * From the foregoing it may, I think, reasonably be concluded that the weather experienced by the vessel was such as might possibly have produced, on a staunch and seaworthy ship, the effects attributed to it by the claimants. But that it was not of such unusual and extreme severity as to justify the assumption, without further evidence, that it caused the leak which occasioned the damage. The carrier to make good his defense is bound to show that the damage arose from a sea peril. It is not enough to show that it might have arisen from such cause. He must prove that it did."

In "The Colima," 82 Fed. 665, 668 *et seq.*, the question of the seaworthiness of the vessel was also in dispute. In this case it appears that the weather did not amount to a gale until 8 a. m.; but at 6 p. m. the master, in order to head the seas, had turned the ship two points off her course. The ship could not, however, be kept head to the seas and occasionally fell off into

the trough of the sea, where she rolled heavily, and in three successive large waves was turned over completely with nearly a total loss of the ship, passengers and crew. It further appears that the vessel had been making this run for twenty years past, and for the past five years had been loaded by the same stevedores who had loaded her for the voyage in question. Yet it was held that the storm was not unusual in character nor more severe than every steamer should be prepared to meet, and that the ship should have been but was not sufficiently seaworthy to meet such a condition.

Likewise in "The Aggie," 93 Fed. 484, 489, affirmed in 107 Fed. 300, which was an action to recover for injury to a cargo of sugar, "the log kept by the chief officer shows entries of stiff gales and high seas, and plenty of water on the deck; that she encountered gales of wind, with high seas. And there are records of a strong breeze and large quantities of water; plenty of water on deck; heavy gales from the west; that the vessel was pitching heavily and taking immense quantities of water on deck. And the mate characterizes the voyage as 'a very rough voyage—very stormy, rough voyage after we passed the Western Islands, at least.' Now, it is argued that weather of this description, causing defects, necessitates the holding that the defect was caused by perils of the sea, and that, as such perils were sufficient to cause the leaks, it cannot

be presumed that the ship was unseaworthy at the beginning of the voyage. However, it is not considered that the storms were so excessive in their nature as to constitute perils of the sea, within the exceptions in the bill of lading; nor were they of such an unexpectable nature that the carrier should not have anticipated them, in fulfilling the duty of providing a seaworthy vessel."

The attention of this court is especially directed to the case of "The Edwin I. Morrison," 153 U. S. 199, 210; 14 Sup. Ct. Rep. 823, 825; 38 L. Ed. 688, and more particularly to the thirteenth finding of fact as set out in the margin of the report, relative to the weather encountered by the vessel. The trial court had found in its first conclusion of law as follows:

"The damage is to be attributed to the dangers of the sea and not to the fault of the vessel and of the severity of the weather. The Supreme Court spoke as follows (14 Sup. Ct. Rep., at page 827): 'We do not understand from the finding that the severity of the weather encountered by "The Morrison" was anything more than was to be expected upon a voyage such as this, that is, that coast and in the winter season, or that she was subjected to any greater dangers than a vessel so heavily loaded and with a hard cargo might have anticipated under the circumstances.' " And it reversed the decree.

Compare also "The Medea," 179 Fed. 781, at 787, recently decided in this court.

The Ninfa, 156 Fed. 512, 521-4.

The Palmas (C. C. A. 1901), 108 Fed. 87, 89.

The Indrapura (C. C. A. 1911), 190 Fed. 711, 713, 715.

ARGUMENT

As to the Inspection in Antwerp

There was no real inspection of the deck caulking in Antwerp. The captain tried the seams with his *pocket knife*—where they looked suspicious—and *nothing whatever was done* (pp. 54-55, 95-98). Mr. Baines made the same sort of an inspection (pp. 257-264), but *only where the decks were clear and it was convenient to do so* (p. 264). There was evidently no serious examination of her caulking. Mr. Garnuchot does not seem even to have used a pocket knife, but was content with mere visual inspection, and *nothing whatever was done to the caulking* (pp. 305, 310). What actually was done is listed on page 305.

Cleaning bottom, two coats of paint, lifted rudder, etc.; overhauling steering gear, two rivets in rudder; replaced some rivets and stanchions in hold (p. 305). This indicates why the vessel was dry docked and what the intent and scope of the examination were.

This was an examination to renew her classification in Bureau Veritas. It related to her seaworthiness for insurance purposes, as a hull to

keep afloat. It had no direct relation to the condition of the decks as a protection to cargo.

Not a caulking iron was used in any examination.

Not a strand of oakum was taken out and examined.

Her caulking was not renewed in a single spot before leaving Antwerp. These are the uncontroverted and admitted facts. Yet the "Babin Chevaye" was just in from a long cruise. The inference, then, is that the caulking after this long cruise was perfect. The inference must be that it was practically new caulking. If that had been the case, would not the owners have hastened to show it? Would not the very first element of their defense have been to show that only a short time before the decks had been completely overhauled and the caulking entirely renewed? Instead of proffering that defense the owners remain silent, and even *ignore our request to state when the "Babin Chevaye" was last re-caulked.*

On the 9th of April, 1912, in connection with the stipulation to take testimony in Antwerp, the appellants filed a notice as follows:

"Please produce at the hearing of the witnesses whose testimony is taken under stipulation, hereto annexed, testimony showing when the Babin Chevaye was last completely overhauled and her decks completely re-caulked, prior to any re-caulking done preparatory to the

voyage in question, giving the amount of material used, the number of men employed and the time employed."

The owners paid no attention whatever to this request for information which lay wholly within their power to produce, and their silence should militate against them, on the ground that where testimony lies wholly within the power of one party who fails, neglects, or on demand refuses to produce it, the inference is that it would be unfavorable to his contention.

The 67th cross-interrogatory (p. 252) attached to this stipulation asks each particular witness:

"Do you know or can you produce any record showing when the Babin Chevaye was last completely overhauled and her main decks entirely re-caulked prior to this voyage, commencing February, 1909?"

None of the witnesses could answer this question, though the Babin Chevaye was not a stranger to them. And it was to anticipate their inability to answer that the request to produce competent testimony on this point was addressed formally and directly to owners and proctors. That they chose to ignore it warrants the inference that the *caulking in the barque when she undertook this voyage was ancient*. We shall show that this inference is supported by the condition of the caulking itself when taken out at Portland, and by other circumstances to which we shall advert. The sole reason for believing

that the decks at the inception of the voyage were well caulked is because three men say so—the captain employed by the ship, Mr. Baines, surveyor, employed by the ship, and Mr. Garnuchot, employed by the Bureau Veritas. Not one of them could say when the vessel was caulked. Not one of them could answer as to the age of the caulking. Not one of them took out a single foot of a single thread. Not one of them found so much as a yard of caulking needing repair. Not one of them used a caulking iron. Their inspection was manifestly casual—as a part of running over the whole ship—and certainly for Garnuchot's purposes of classification in Bureau Veritas leaky decks on a particular voyage would cut no figure.

Capt. Hoben, marine surveyor in the Port of Portland, tells how a proper examination ought to be made, and common sense supports his statements. He inspected the decks of the *Babin Chevaye* preparatory to her outward voyage from Portland with wheat. He says (pp. 177-178):

Q. Captain, how old are you?

A. Seventy-two. I have been over sixty years at sea. I was master in '64—one year before the rebellion was over. Of course I have had a little experience—and caulking decks—twenty-one years, going on twenty-two—here in Portland. All these ships come under me. I have good knowledge of a deck. I have only to look at it. I don't care to dig with a jack knife, for I con-

sider that would be only to keep out hail stones. *I try with a caulking iron—a proper caulking iron*—and if a deck wants caulking you got to have it caulked before I grant a certificate.

And again (p. 191):

Q. I would like you to explain to the court what you mean when you say the caulking is soft.

A. Well, that means the caulking ain't good.

Q. Well, in what way isn't it good?

A. Well, when I take the pitch out of a seam I get what we call a "making" iron. It is a caulking iron—a steel "making iron." It has a flatter point. I put that down and hit it. If it goes half an inch very well, but if it goes down an inch or an inch and a half I say it is soft. That is in bad condition.

We submit that no expert knowledge is required to show the difference in value between Capt. Hoben's mode of examination as above stated and as actually given the deck of the *Babin Chevaye* and the casual general and loose inspection given in Antwerp—a sweep of the eyes and an occasional punch with the point of a knife.

Having shown the method employed by Capt. Hoben in his inspection of her deck in Portland we now wish to show the

Actual Condition of the Deck

Capt. Hoben says (p. 167):

Q. What condition did you find her decks in—her main deck?

A. I made a survey when the ship arrived here of the ship in general for damage, and her decks. That would be about the 13th of August.

Q. What condition did you find?

A. (P. 168.) Didn't find them good enough to satisfy me she was in condition to carry a wheat cargo, and on that cause I wouldn't grant a certificate until her decks were caulked.

* * * * *

Q. And what was the matter with the main deck?

A. Well, the deck was *soft in general* and on the passage out was patched up considerably in places on the voyage from Antwerp to this port. I couldn't say where it was done. *There were many places that they had touched up.* I suppose they leaked. And I also went down into the hold and found many barrels of cement *all over the ship* which were more or less damaged from leaks in her deck.

Q. How were those leaks in regard to being general, running fore and aft and athwart ship?

A. Oh, the leaks was principally *all over the deck*, etc.

Q. (P. 174.) Why does it become necessary to re-caulk the vessel from time to time?

A. Well, a deck *properly caulked is good for three or four years*, except the butts. But a deck that is not properly caulked, or just run over, is good for about one year. But I have caulked decks, and when I caulk decks or see them caulked in Portland you don't find any claims coming back for damaged cargo. * * * *

In justification of the old man's boast, the master testified that after the re-caulking ordered

by Capt. Hoben he himself made three voyages around the Horn in the *Babin Chevaye* and had no trouble about sea-water damage. Then he left the ship and the sea. There are two conclusions which may be deduced from the fact that after re-caulking in Portland he delivered three cargoes in "splendid condition" after rounding the Horn—the most notorious foul weather breeder in the world; one that the deck when she left Antwerp was perfectly seaworthy, and the weather experienced on that voyage was incomparably bad; the other that the deck when she left Antwerp was not seaworthy. Had it been in as good condition as when she left Portland there would have been no more damage on the Antwerp to Portland voyage than on the three successive ones around the Horn. We think the latter conclusion the more reasonable. It is inconceivable that three voyages around the Horn would not furnish some weather very comparable to that of the Cape of Good Hope voyage; inconceivable that had the deck been in as good condition as when it kept safe and dry three cargoes around the Horn, it would have leaked like a sieve its entire length on the Cape of Good Hope voyage and the top thread have been found so rotten it had to be taken out over the entire deck. The contrasts are too preposterous and not justified by the evidence.

The master says (p. 87):

Q. Did you carry a cargo in the *Babin Chevaye* from Portland to Europe when you left in the fall of 1909?

A. Yes, full cargo of wheat.

Q. In what condition did that cargo arrive at its destination in Europe?

A. *Splendid condition.*

Q. Did you carry a cargo from Europe to Portland on the next voyage of the Babin Chevaye?

A. Yes. Cement for Meyer, Wilson & Co.

Q. These same libellants?

A. Yes. These same receivers.

Q. In what condition was that cargo when it arrived in Portland?

A. *Very good condition.* I believe that claim was made for only *three barrels*, and without having any wet barrels.

Q. Did you carry a cargo on the Babin Chevaye on the return trip to Europe from that time?

A. Yes. Again a cargo of wheat.

Q. What condition did that cargo arrive at its destination in, Europe?

A. *Also splendid condition.*

Q. What cape did you round on these voyages I have last asked you about?

A. Yes. Cape Horn each voyage.

Of course the captain says the weather on these voyages was not comparable to that on the Good Hope voyage, which was the worst in his whole maritime experience, but as we have already stated, we are not going to take these mere flat assertions as gospel, and hope to show that the weather during the Good Hope voyage was only what any vessel undertaking such a voyage ought to expect.

Continuing to examine into the condition of the caulking when the vessel arrived at Portland,

we call attention to the testimony of Mr. Jordan, a master caulker of forty years' experience (p. 142):

Q. How much of the deck did you re-caulk?

A. *The whole main deck—all of it.*

Q. How much of the old caulking did you take out?

A. Well, one thread (printed erroneously "third"), sometimes two; where it was *real bad* we took out a *good deal more*.

Q. What condition did you find the caulking that you took out—as to age and softness?

A. *Well, pretty poor condition.*

Q. Well, explain a little more definitely what you mean by poor condition, as to softness and rot?

A. Well, the oakum was *decayed*—had lost its covering for its protection—I suppose by the shipmaker. The pitch is a protection for the oakum. Oakum won't stop a leak itself—has got to be protected by another coating, kind of pitch or something else.

Q. Had the oakum lost its thread-like character and continuity so that it was putty-like?

A. *Yes, sir. Yes, sir, it was decayed.*

We think this testimony is worth all the testimony of claimants put together. Here was the whole deck rotten in its caulking—the whole top thread, and often much more, decayed soft.

Claimants seek to avoid this inevitable conclusion of unseaworthiness by suggesting that this top strand had rotted *after* the storms of May; that is, that a tarred or creosoted fiber had

completely rotted over the whole deck between the middle of June and the middle of August. It is preposterous, and they recall Capt. Lebeaupin to explain away the force of our testimony. He admits the oakum was rotten, but says it was caused by the wood of the deck becoming soaked, then communicating this moisture to the pitch, and made the pitch rot a little (p. 203). We submit this is nonsense. The wood of a deck is supposed to be wet indefinitely without harm, and as for water rotting pitch it wouldn't do it in a thousand years. Pitch is impervious to water.

The captain gives as his second reason (p. 203) that on account of the straining the seams opened in certain places, and as the water couldn't get through it followed the seam into the deck that had become soft, and as soon as oakum gets wet it rots gradually.

The captain's final explanation (p. 204) is that the deck forward of the fore-castle head was in good condition and was not re-caulked, the reason being it was free from water during the bad weather, whereas the main deck aft of the fore-castle head was *never* free from water, except probably *one week in three whole months* of bad weather.

In three weeks it was dry only a few days (p. 204). During the bad weather the deck was *all the time* under water, not exactly up to the bulwarks but covered with water during the *whole 24 hours*.

We think the captain has proved too much. In the first place, if the pitch was rotted and the seams so bad and the whole condition of the deck so changed after the bad weather he should have overhauled his decks and re-caulked. But he expressly says that the six days in Hobart Town he did no re-caulking to the deck except a few places around the hatches, and that he did no re-caulking in all the fine weather after leaving Hobart, from the middle of June till he arrived in Portland, except a few places for the upkeep of the deck.

His testimony is as follows (p. 119):

Q. What caulking did you do when you got to Hobart Town on the main deck, as to quantity? Just state how many places you re-caulked.

A. On the starboard side in some places and around the hatches where I thought were leaks.

Q. Many places on the starboard side?

A. *No. Just off the main hatch.*

Now this, the court will remember, was in June and after practically all the stormy weather had been experienced.

★ ★ ★ ★ ★ ★ ★

A. I did not caulk the poop deck in Hobart—merely on the voyage when we were in the equatorial regions—where slight repairs were required.

Q. And did you do any caulking after leaving Hobart—between Hobart and Portland?

A. Once a week I sent my first mate over the deck to do what caulking was necessary.

Q. What I am trying to get at is how much caulking was actually done.

A. I didn't. I can't say in what places. In small places. Probably here and there—wherever it was required in the usual upkeep.

Q. Well, was there *much* done or *little*?

A. *Very little.*

We have here this condition: A deck wretchedly rotten in its caulking in August and condemned throughout in Portland, the master claiming this condition was all produced in good, sound seams by bad weather since May and June; that he examined the caulking by his first mate once a week; that he had fine weather after the middle of June, yet he did not discover this dilapidated condition. On the contrary, the examinations showed very little to be done and very little was done. And by inference it is perfectly clear that had it not been for the bulldog vigilance of Capt. Hoben this captain would have started back to Europe with these same rotten and patched up seams over a cargo of wheat. No initial effort was made by the ship to re-caulk her decks. Hoben says (p. 68): "I wouldn't grant a certificate until her decks were caulked." And it is fair to assume that could the Babin Chevaye have got away with the wheat and have saved the expense of re-caulking, any damage to the wheat would have been met with the same extravagant weather and claim of sea peril.

The other claim of the captain is, that as the caulking under the fore-castle house was not replaced, *ergo* that on the open deck was just as good and would have been as good if it had not been for the constant wetting to which it was exposed and to which the deck under the fore-castle was not.

We want the court to notice that the deck was re-caulked from the combings of the after house to the combings of the fore-castle head or forward house, or as Jordan said, "*All the main deck—all of it.*" And in the sense of this suit that is so because you can no more compare that part of the deck which is under the protection of the two houses than you can compare your outside porch floor with your parlor floor. They are absolutely protected and the original caulking under these roofs—the poop deck and the fore-castle head—would be found sufficient years after the seams of the exposed and open deck had decayed. We think the general rot of the caulking on the main part of the main deck—and the sufficient soundness of that under the houses—proves that the whole main deck had been undergoing a process of general deterioration, for had it been due to this one voyage and had the vessel been flooded from stem to stern, clear over the rail constantly, as the master insists, her after quarters deluged by the wave of

May 6, then even the covered decks were saturated and there should have been no such difference in sudden deterioration due to wet and strain between the open deck and the covered decks. Because on this voyage by the captain's testimony both covered and uncovered decks were equally wet. A sudden one-voyage deterioration of the seams of the open main deck would certainly have left them in a condition more nearly approaching that of the seams of the forward and after covered decks, but the seams of the open deck were rotten throughout. They had felt not the stress of one voyage in the weak places, but the universal decaying touch of time.

Mr. Jordan, the caulker, who should be decidedly the best informed witness, dissents from the master's conclusions. He says (p. 144):

Q. Simply all the top threads that would be in bad shape?

A. Yes, sir. Yes, sir.

Q. Now, Mr. Jordan, couldn't that be caused by the heat in passing through the torrid zone—the condition in which you found the pitch?

A. No, sir.

Q. You think not?

A. No.

He then shows (p. 144) that the oakum which was left in the seams all had to be "horsed" down with a "horsing iron," which, as explained by Capt. Hoben (p. 191), shows the seams were all soft. And Jordan says (p. 144) that he put in

11,000 running feet of caulking, working fourteen men for seven days (p. 145.) That this is renewal of a decayed, worn out and ancient caulking is, we submit, self-evident. It is not the repair to a good, sound deck, necessitated by such straining as opened the seams in the weak places. This condition was *general*. *Every inch* of the deck caulking was decayed.

Capt. Crowe, on cross-examination, in answer to a long question pre-supposing that the vessel strained, seams opened and decks were covered with water 48 hours at a time, says (p. 161):

A. Oh, the top thread will deteriorate some, but it wouldn't deteriorate the oakum but very little, unless there was a motion—a bending motion of the hull—a bending like a bending up and down of the deck on its fore and aft line, or straining the other way—athwart ship. Unless there was strain enough to do that it wouldn't affect the oakum.

Q. Suppose the vessel did strain in the way you describe, what effect would it have on the oakum?

Objected to. No such evidence. It is a steel vessel.

A. It will *partially* chew the oakum on top. It will crack the pitch and throw it out *in places*, and it will get quite soft.

There is no evidence of any buckling of the vessel. The Babin Chevaye was of steel with a steel under deck, not water tight, but intended as a structural brace (p. 175), after the manner of French ships; and Capt. Hoben says such ships

“don’t work much” (p. 175). But admitting that there was straining and buckling and working, it would show damage, as Capt. Crowe says, only “*partially*” in the *weak places*. No *straining* would reduce the caulking to a *uniform* state of decay, as was the case.

Capt. Hoben says:

“Deck was soft in general (p. 168). Tested deck full length of ship (p. 183). Cargo damaged through leaks in deck and stays carried away (p. 184). Many barrels damaged *all over the ship* (p. 168). *If the water was on it for three weeks it ought to keep tight, provided nothing is carried away; that is the intention of the deck when properly caulked, the same as the bottom of the ship; it is supposed to keep out water. It is not supposed to leak*” (p. 174).

Capt. Crowe says:

“Decks could be under water for a fortnight and they would not leak unless she strained” (p. 163). One wave pooping the ship could not open the deck seams the whole length” (p. 164).

Jordan says:

“We ‘rived’ the whole deck—took out one thread or two where it was necessary, out of the *whole* deck, from the *combing*s of the face of the cabin to the *combing*s of the forecastle head; re-caulked the *whole* main deck; took out one or *more* threads” (p. 143).

Mr. Tucker says:

"The damage to the steel was more or less throughout the whole vessel. * * * * The salt water damage was pretty well all through the vessel" (pp. 139-140).

It will be remembered that Capt. Lebeaupin said he had done very little patching in the caulking. From the condition of the decks in Portland it is very evident he ought to have done a great deal in the two months' fine weather he admittedly had after the storms (middle of June to middle of August. See protest, p. 359).

We may make this logical statement: If the wholesale rotten condition of the seams as found in Portland was caused by May storms he should have found this out and re-caulked before he left Hobart Town, or during the fine weather of June, July and August.

By his own statement he did not find it out and re-caulked in small places here and there—very little (p. 119). Evidently the deck must have seemed to him about the same as when the barque left Antwerp, and he failed to discover this sudden deterioration under the influence of wet and tropical heat that he advances as a theory to account for the rotten caulking.

Or on the other hand, if Capt. Hoben be right that there had been "considerable patching up," "many places," "all over the deck" (p. 168), then the master has not been candid in saying the entire re-caulking was "very little," and he has

not been candid because he knew his storms would not explain or justify such wholesale re-caulking, but the fact of large repairs would imply an old, unsound deck (as to caulking) at the inception of the voyage.

We insist there has been no sufficient explanation for a deck completely rotted as to the top thread, and often deeper, "from the combings of the face of the after cabin to the combings of the forecastle head—the whole main deck. There has been no theory which satisfactorily accounts for one cargo damaged by leaks all over the deck and after Mr. Jordan's re-caulking of the whole deck three voyages around the Horn and not a pound of cargo damaged.

There has been no explanation why the owners refused to tell us when the Babin Chevaye was last re-caulked.

We will now take up the question of

The Weather

Here, as with the caulking, if we have to accept the captain's and his officers' mere assertion, with Gallic emphasis, we might as well quit. But here, again, we desire to oppose circumstances and facts to adjectives and assertion.

The following facts will appear:

The Babin Chevaye made the "*average voyage*" as to time (p. 121). In all the weather com-

plained of she only left her course to run with the wind for safety *once*, the storm of May 5th and 6th (p. 107, 116). The storm of the 6th of May and of the 12th of May were the worst experienced. These were the two worst days of the voyage (pp. 96, 115, 117). The French rate the force of the wind from 0 to 12. Six is strong breeze and seven is moderate gale, eight fresh gale, nine strong gale and ten whole gale, eleven storm, twelve tempest (tempete) "impossible to carry sails" (p. 104). The captain calls eight a light blow (p. 99) and admits what every sailor knows, that a "gale" is good sailing weather if the wind be in the right direction for the course (p. 104). He says that in his log and protest "squall" means a sudden rise and sudden fall in the wind after a short duration (p. 106). He also says that average weather is nine to ten, that "eleven" is unusual and he had "eleven" two days—May the 6th and 12th—but also lesser bad weather two or three times a week and for a long period (p. 121), and that twelve is a cyclone and would carry away all sails (p. 121). Yet on the 6th of May, with the storm at its height (eleven), he carried the same canvas he had on the day before when the wind blew only nine to ten and had not reached the classification of a "storm"; the foresail, the lower fore topsail, the mizzen middle staysail and the mizzen topmast staysail (p. 108), four large sails—the foresail, one of the largest of the ship. He carried this

spread of canvas with the wind at eleven when had it been one degree higher—twelve—he could not have carried any sail at all. On May 12th (when he rates the wind at 9 to 11) he carried (p. 116) the foresail, the lower fore topsail, the lower main topsail and the fore topmast staysail, an even greater spread of canvas than on the 6th of May and the 5th of May, when no higher rating than “a gale” had been reached, and within one sail as heavy a spread as on the 4th of May when the wind was three to nine, or only strong gale (p. 103). That this spread of canvas is wholly inconsistent with the weather described needs no expert showing. She couldn’t have had “eleven” weather, just short of a hurricane, when she could have carried no sail, and yet carry such a heavy spread of canvas. Had the weather been what it is rated—eleven—a mere scrap of double-reefed foresail or a fore topsail would have been all she dare carry. Manifestly she could not carry the same sail set for “three,” gentle breeze; eight, fresh gale; nine, strong gale, into ten, whole gale, and eleven, storm, yet that is exactly what she did; on the two worst days, May 6th and 12th, carrying the same sail as on May 4th and 5th, except that May 4th had the addition of an upper fore topsail (p. 107). There is either something wrong with the sails or the wind. If he carried that spread of sail there wasn’t the force of wind claimed. It is easy to write ten, eleven or even twelve in a log and support it on the

stand, but it contradicts the sail carried. A comparative table would be as follows:

<i>Date.</i>	<i>Wind.</i>	<i>Sails.</i>
May 4. (P. 103)	3 to 9—	Lower fore topsail, foresail, lower main topsail, upper main topsail, upper fore top- sail. (P. 107.)
May 5. (P. 107)	9 to 10—	Foresail, lower fore topsail, mizzen middle staysail, miz- zen topmast staysail. (P. 108.)
May 6. (P. 107)	10 to 11—	Same as on the 5th. (Pages 107-108.)
May 12.	10 to 11—	Foresail, lower fore topsail, lower main topsail, fore top- mast staysail.

We repeat, no vessel could or would carry the same sail in "eleven" (storm) that she had carried in "eight" (light blow) and nine (strong gale). She could not and would not carry the spread given above through weather correctly rated eleven when at twelve she could admittedly carry no sail at all.

Capt. Crowe says (pp. 153, 164, 165, 166):

The amount of sail carried is always in relation to the force of the wind; that in "twelve" weather you can carry no canvas at all, in "eleven" very little; that eleven weather is very rare; that the sail given is "a large amount of sail to carry with the wind, as we are *led to believe it is.*" "I doubt very much if the sails would stand or the gear. It would be an enormous pressure of canvas for a force 'eleven' of wind."

Capt. Hoben says (p. 173):

The ship was staunch and strong in every way, barring her decks (I leave them out) and she could carry any sail would stand the wind, but *if* it was blowing as hard *as the captain explains it I don't think the canvas would stand the pressure.*

And (p. 188):

The man who commands the ship ought to know when it is time to shorten sail and when it ain't, but what I said, that it appeared to me the amount of sail she had was a great deal for the heft the wind was blowing, and I can't understand yet, with a blow that hard, how she could carry that sail. I don't know whether you had them sails on or I never know whether 'twas blowing that hard. I only say, if blowing "eleven" it is about ninety—which is more than a hurricane—that the sails could hardly stand it.

Captain Veysey says (p. 196):

That is the *ordinary canvas to run* with in those latitudes in that time of the year. In other words, the weather was ordinary.

Much is made in the protest and the trial of the pooping of the ship by a large wave May 6th, and it does have the tragic element that two men were lost overboard. But it was a single casualty, without relation to general stress. It was, as Capt. Veysey says, one of those accidents which will happen when a ship's bow will pop up and her stern pop down, and before it can rise out of the way a big wave takes it (p. 197).

We call the court's attention to the fact (see protest, p. 361) that the day was squally rather than a severe storm; that the vessel was at the time making only $10\frac{1}{2}$ knots per hour—certainly not indicating a great weight of wind in the spread of sails we have seen she had; that by the protest, after the gale at noon the weather gets a little better, the squalls become less strong; that at 3:25 p. m. the vessel was lifted in her bow by one wave and while her stern was away down the other pooped her, stove in the chart room door and flooded the cabin and store room, carried two men overboard and injured others. But then it was all over. It was like a stroke of lightning.

We will show that so far from the weather being very bad—some of the men not on watch were lounging on the poop deck—no one was lashed to anything and no danger from the sea was anticipated; that in fact one of the crew had just gone into the store room for some material with which he was about to go aloft to repair a sail. The master (p. 111) says there were eight all told on the poop deck: Two at the wheel, steering; two in front of the chart room, two close to the wheel, and then the officer of the watch and the second boatswain, and another man was just down in the sail room to get additional sail. He went down there to get material to fix the sails that had torn loose so as to attach them again to the stays—the lower fore topsail

which was spread—the stays were torn loose somewhat. He was going to go aloft and fix the sail. He had been ordered to do that. He actually did so one or two hours later, after we had saved the injured (p. 112).

Q. Were the men lashed to the wheel?

A. No.

Q. Well, the weather wasn't such that you anticipated being pooped by this wave, was it?

A. No, because even the two men who were close to the wheel were there on their own account and were even amusing themselves by looking at the waves.

The Structural Deficiency

We can say all there is to be said on this point very briefly. Our contention is that there is but one deck intended to keep out the sea, but one roof to a ship—the main deck.

The main deck, the bottom and the sides make the water-tight structure known as a ship.

It is necessary to pierce the main deck in certain places, but we claim every piercing should be as capable of being made water tight as the hatches are. It is no excuse to say the piercing is under another deck. The poop deck and the forecastle deck are not properly decks. They are superstructures; underneath them is the real deck, and it should be constructed on the theory that the houses or all superstructure may be swept away, yet so long as the main deck remains

the sea cannot enter the hold. The court below says there is no evidence to this effect. It does not need evidence. It is self-evident. Suppose we had shown one of the hatches had no combing and could not be made water tight. Certainly we need go no further. We have shown there were two small hatches through the main deck which had no combings and could not be battened and made water tight. We claim the fact that they were under cover of the poop deck or after house is no defense, because the poop deck or the house might be crushed in, as actually happened in this case, and still the main deck should be capable of being water tight. Had these two hatches had combings or been *water tight no harm could have come to the cargo from the pooping wave* of May 6. We claim that the vessel is structurally defective in not building these hatches with combings and capable of being made water tight. But the further defense is made that the hatches were in constant use. *Both of them were not.* The one not in use was as open to the sea as the one in use. But even in use they would have been comparatively harmless had they been provided with combings or bulwarks around them to turn away the water.

One of them was open because a man was getting material to repair sail stays with which he was about to go aloft when the ship was pooped.

This fact shows that the weather was not bad. But admitting the necessity for having the hatch

open, this does not excuse the other one from being open, nor does it excuse either for the absence of combings.

A. On each side of the vessel there is a small hatch like that.

Q. And were they both open?

A. The one in the sail room was open, but the other one was closed but not secured—not water tight.

Q. Not battened down?

A. Not battened down.

Q. Those go through the main deck, do they?

A. Yes. (P. 108.)

* * * * *

Q. Now, captain, had you anticipated all of your upper works being carried away and the sea constantly breaking over you here, you would have had that hatch closed, wouldn't you? (Objection.)

A. If that would have happened, why the chances are that the whole vessel would have gone down. (P. 109.)

He then states he doesn't think these hatches would have foundered the vessel, and anyway a vessel is supposed to sail as she is built.

Q. Well, couldn't you have made those hatches water tight?

A. You would have to make changes.

Q. In the ship?

A. They are on the same level as the deck, so I can't put any air tightening on it unless I would nail it down, but then that would prevent me from getting down there to get my provisions.

Q. No combing, then?

A. No.

There is the structural deficiency; had there been hatch combings the water on the deck level would not have poured into the hold even when the hatches were open, and in emergency they could have been battened down absolutely water tight.

The Distribution of the Cargo was Bad

Against the positive assertions of the master and others we can only oppose Capt. Hoben and Mr. Tucker, yet Capt. Hoben's opinion, from an inspection of the vessel immediately on her arrival, is to us so convincing and so explanatory of the whole situation that we ask the court to give it careful attention.

I wouldn't consider the cargo properly distributed (pp. 170-171). These French ships may strain, but they can't work much (p. 175). Caused by cargo being too low (p. 180). In distributing cargo you have to take into consideration what kind of a cargo it is, etc. (p. 181). Don't know whether ten per cent or forty per cent was between decks; believe heft of cargo in lower hold with the heavy sea was cause of straining. I base it on the condition I found the ship in (186, 187. Note these pages particularly). Told the captain if he carried two more cargoes like that his ship would go to pieces (p. 187).

Personally we consider this disinterested expert's knowledge, based on an inspection of the ship after her arrival, as more convincing than

that of interested parties, who say they loaded the ship by a rule of percentages.

Mr. Tucker says: "I was of firm opinion there was not sufficient cargo stowed in the between decks." And he gives his reasons. (Pages 36, 37.)

In Conclusion

It must be remembered in setting up perils of the sea, the burden of proof is on the ship. In fact so far as mere words go it is all in her mouth. Shippers are nearly always helpless. If a vessel can justify decks like the Babin Chevaye's, rotten as to caulking throughout, if owners can refuse to give the date of last re-caulking and get away with the case on mere extravagant statement belied by the circumstantial evidence, if the burden of proof is sustained by such evidence as that in this case, then shippers will be wholly in the hands of the shipowner.

Respectfully submitted.

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ERSKINE WOOD,

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In the United States Circuit Court of Appeals For the Ninth Circuit

GEO. H. C. MEYER, H. L. E. MEYER, Jr., J. W. WILSON
AND JOHN M. QUAILE, PARTNERS DOING
BUSINESS UNDER THE FIRM NAME OF
MEYER, WILSON & COMPANY
LIBELLANTS AND APPELLANTS

vs.

THE BARQUE "BABIN CHEVAYE"
DEFENDANT

BUREAU FRERES & BAILLERGEAU
CLAIMANTS AND APPELLEES

Appellees' Brief

STATEMENT OF FACTS.

Pursuant to the provisions of a charter party executed on the 16th of December, 1908, and in evidence as Claimant's Exhibit 3, the French Barque "Babin Chevaye" left Antwerp on the 16th of February, 1909, with a miscellaneous cargo destined to Portland, Oregon. On the arrival of the vessel at Portland on the 23rd of August, 1909, it was found that a portion of the cargo was damaged, and this libel in rem has been

filed for the purpose of recovering the damage claimed by libellants who were charterers of the vessel.

The charterers under the charter party were entitled to the full capacity of the defendant ship and a full cargo of 2984 tons was loaded on the vessel. The original libel charged that the vessel was unseaworthy at the time when she left Antwerp in two respects: It was contended that too large a portion of the cargo had been stowed in the hold, and too small a portion in the between decks, and that the vessel was therefore too stiff. It was contended in the second place that the main deck of the vessel was leaky at the inception of the voyage. There was an almost complete failure of proof on the part of libellant as to the first of these contentions, and the proof on behalf of claimants was so clear that in their brief in the lower court, counsel for libellants did not insist upon their right to recover on this ground. We judge from their specification of errors found on page 372 of the record that this ground will not be insisted upon in this Court.

The testimony in the Lower Court showed that the decks of the defendant vessel had been carefully inspected at Antwerp, and three witnesses, all duly qualified, testify that these decks were in excellent condition and perfectly tight. These witnesses are R. R. Baines, who superintended the stowage of the cargo, Emile Garnuchot, Surveyor for the Bureau Veritas, and J. Lebeaupin, master of the vessel. This testimony is not controverted in any manner except as an inference to the contrary might possibly be drawn by the fact that the cargo sustained damage en route from

Antwerp to Portland. The evidence shows that the damage was comparatively small. Mr. Alfred Tucker, general agent for libellants and their representative at the Port of Portland, testifies on page 34, that the damage amounted to \$1,491.26. The statement of damage as introduced by this witness included an item of \$64.40 (Libellant's Ex. A) for four months' storage of the cement, which we think was clearly improper. The testimony of libellants' own witness, Henry Griffin, says that the entire work of re-conditioning the cement consumed six weeks with the men working at the job off and on. (*Record*, page 147). This included the work of two men half the time and four men the remainder of the time. Even if the storage charge was proper to be made against claimant, it is apparent that a four months' storage charge was excessive.

For some unaccountable reason appellants have transmitted to this court the verification attached to claimant's Exhibit "5," which is a manifest of the cargo (See *Record*, 357), but the manifest itself has not been made a part of the record. We therefore do not have a statement of what this cargo consisted of in English, but Exhibit "B," attached to the Meeuwissen deposition, found on pages 293-295, gives the contents of the cargo in French. It will be seen from this exhibit that the cargo contained 4940 barrels of cement (*Record*, 294-295). Mr. Alfred Tucker, the general agent of libellants, testifies on page 132 of the record, that 961 barrels of the cement were set aside as damaged. 156 of these barrels required only a little hammering to make them merchantable. On reconditioning 805 barrels

there was a loss of 224 barrels. This is the testimony of libellants' general agent. It shows that the loss on the cement was less than five per cent. No damage is claimed for the ochre, talcum, Venetian red, or for the sacks of grain, all of which must have been damaged if in contact with water. The cargo contained a large quantity of iron and steel, the value of which is not shown by the record, but which must of necessity have been great, yet the entire damage claimed by libellants to the iron and steel is only \$597.00 (Libellants' Exhibit "A"). It is apparent from these facts that the amount of water received in the hold of this vessel was comparatively small.

The damage is fully accounted for by the exceptionally stormy voyage which the vessel had. The testimony shows that from the 18th of April to the 1st of July, the weather was continuously bad, except that from the 30th of May to the 5th of June, the vessel was at Hobart Town, Tasmania. From the 5th to the 15th of May, the weather was at its worst. A concise account of the voyage will be found in the protest, which is in the record on pages 359 to 368. The contents of the protest are abundantly borne out by the testimony of Captain Lebeaupin and his officers, M. A. F. Rehel and F. M. Grennapin. The 5th of May was a bad day. The 6th of May was worse. On these two days the decks had been constantly flooded with water, the wind and the sea were extremely high. At 3:25 in the afternoon the vessel encountered two large waves. She rode the first of them, but while the stern of the vessel was in the trough of the sea a second wave, thirty

feet high, struck the deck, carried two men overboard, broke the arm of one man, the leg of another, and the jaw of a third. This wave demolished the wheel house, smashed in the door and wall of the chart room, and severely strained the entire vessel. The chart room was under the poop deck of the vessel, which was almost equal in strength, as the lower court stated in his opinion, to the main deck of the vessel, and was much less exposed to the waves. A small hatch opened from the chart room into the sail room. It happened that this hatch was open at the time when the great wave struck the vessel on the 6th of May, one of the seamen being down in the sail room for the purpose of securing material with which to fix the lower fore topsail, whose stays had torn loose somewhat (*Lebeaupin*, 112). The water went from the chart room into the sail room and spread out to a considerable extent throughout the cargo. The testimony shows that the hatch in question led into the portion of the vessel where the provisions were kept, as well as the sails. It was necessary many times a day to visit the compartment where sails and provisions were kept (*Lebeaupin*, 72-73) and the lower court very properly held that no fault was to be attributed to the vessel in not battening down this hatch. In any event the failure to batten it down was not the cause of this accident. Whatever rule is adopted as to the proper construction of the vessel as regards the protection of this hatch, the fact remains that at the time in question the hatch was properly open for a purpose essential to the proper navigation of the vessel. The evidence of Captain Lebeaupin, Mr. Rehel, and

Mr. Grennapiu shows the tremendous force of this wave which overtook the vessel on the 6th of May. The damage was repaired as thoroughly as it was possible to repair it while the vessel was at sea (*Lebeaupin*, 73-75) but the impact of the wave had materially weakened the vessel. Unfortunately it encountered a still more severe storm on the 12th of May. On that day the deck was covered with water up to the bulwarks. The sea was heavy. The weather is described by Captain Lebeaupin as awful, the masts and rigging were strained severely, the ship rolled heavily, the poop ladder, the covers to the lifeboats, one of the tarpaulins on the main hatch and the tarpaulin of the man hole of the pump were torn and carried away (*Lebeaupin*, 76-77). The port side of the deck house, although reinforced with a steel plate, was dented in (*Record*, 77-78). The cement of the stanchions around the main hatch was broken, and many of the rivets at this part of the vessel were also broken (*Record*, 82). One rivet had entirely parted, creating a leak three-fourths of an inch in diameter (*Record*, 82, 344). There was a period of forty-eight hours when the decks were completely flooded, and when it was impossible for anyone to be on the decks (*Lebeaupin*, 83). During this time the parted rivet could not be repaired, but it was repaired at the earliest possible moment (*Lebeaupin*, 83). On the 18th of May the pumps were clear and on the 29th of May the vessel reached Hobart Town (*Lebeaupin*, 84-85). The three disabled members of the crew were left at the hospital, and on the 5th of June the vessel left Hobart for Portland. The weather continued pre-

vailingly bad until the 1st of July (*Lebeaupin*, 85-86). Captain Lebeaupin, who had rounded Cape Horn sixteen times, says that he never saw such bad weather as he encountered on this voyage (*Record*, 86). Mr. Rehel says that in nineteen years' experience at sea this was the worst weather he ever encountered (*Record*, 330, 346). Mr. Grennapin, who had been sixteen years at sea (*Record*, 348) states that he never saw such bad weather as this on any other voyage (*Record*, 351). Claimant contends, and the lower court held, that the evidence in this case accounted for the damage to this cargo and showed that it was due to perils at sea, for which under the charter party, the ship was not responsible.

The testimony shows without contradiction that prior to the storms in the early part of May the vessel did not leak, and that the pumps were clear at all times (*Lebeaupin*, 66, 68). This circumstance, together with the smallness of the damage, is a demonstration, we contend, that the damage in question was caused by perils of sea.

If the decks of the vessel had been leaky at the inception of the voyage, as contended by libellants, the damage must have been far greater and the pumps could not have remained clear.

The charter party (Claimant's Exhibit "3") contains the usual stipulation exempting the vessel from liability for damage sustained by the cargo as the result of perils of the sea.

ARGUMENT.

The questions at issue on this appeal being principally questions of fact, the argument in its most important features must be a discussion of the evidence. The general facts having been already set forth, we shall ask the attention of the court to a discussion of the evidence with reference to the three or four mooted questions of fact in the case.

STOWAGE OF CARGO.

An issue was raised in the pleadings with reference to the seaworthiness of the "Babin Chevaye" as regards the stowage of her cargo. As we have previously stated, we do not understand that this point is now insisted upon by appellants. The stowage was attacked as improper only on the ground of distribution of the cargo. The contention of appellants in their libel is that too large a proportion of the cargo was in the lower hold, and for that reason the vessel labored and strained, causing her seams to open.

We think the court will find that no witness for appellants has done more than guess at the distribution of the cargo as between the lower hold and the between decks. The witness who knows absolutely what the facts are with reference to this matter is the witness Meeuwissen, who testifies on page 283, that 960 tons were in the between decks and 2029 tons in the lower hold. He reinforces his testimony with a stowage plan found at page 292 of the record, and sets up a copy of his tally book on pages 293 to 295. The court will see that this witness knows absolutely where each

portion of the cargo was placed, and that he testifies from a record made at the time. His testimony is corroborated by that of Captain R. R. Baines (255), J. Lebeaupin (61), and first officer Rehel (322-323, 335). The testimony is to the effect that ordinarily two-thirds of the cargo should be in the lower hold and one-third in the between decks. The court will see that this cargo closely approximated to this rule in the distribution as between the lower hold and the between decks. It appears from the testimony of Albert Crowe, a highly intelligent witness (*Record*, 135) that a departure of 50 to 75 tons from the rule would make no difference in the navigability of the vessel. Captain Crowe also testifies that the captain who navigates the vessel is the man who knows best as to her navigability on this question of distribution of cargo (*Record*, 135-136). The uncontradicted testimony shows that this vessel sailed easily, and that there was nothing in the manner of her navigation which indicated any improper distribution of the cargo as between the lower hold and the between decks (*Lebeaupin*, 64-65).

Appellants' testimony on this subject was characterized by an entire failure of proof, so much so that we find it impossible to discuss this question from the standpoint of appellants' testimony.

DECKS TIGHT AT ANTWERP.

The evidence shows clearly that at the time of her departure from Antwerp on the voyage in question, the "Babin Chevaye" was in seaworthy condition in all respects, and particularly in the respects in which her seaworthiness is questioned by appellants. We refer

in this connection to the testimony of Emile Garnuchot, found in the record on pages 295 to 317. Mr. Garnuchot testifies that he is an expert of the Bureau Veritas. He explains on page 303 of the record, that the Bureau Veritas is an International Society for the classification of vessels, that the French Government has recognized the Bureau for carrying out its navigation laws, that on presentation of the certificates of the Bureau Veritas the French authorities deliver permits of navigation. Mr. Garnuchot testifies that he examined the "Babin Chevaye" in January, 1909. We quote the following portions of his testimony:

(*Interrogatory VI*). Q. State fully and in detail the character of the examination made.

A. I inspected the "Babin Chevaye" afloat and in drydock at Antwerp according to Article 8 of the Rules for her heavy survey (inspection of the vessel in drydock general inside examination—rigging—deck and caulking—winches—windlass—outfit—donkey boiler.)

(*VII*). Q. What was the purpose of this examination?

A. To ascertain the condition of the vessel for classification purposes.

(*VIII*). Q. What did you find the condition of the vessel to be?

A. After having ordered the hereafter described repairs, I consider that the "Babin Chevaye" at that time was in good seaworthy condition. It is therefore, I have signed the certificate of this vessel for the maintenance of her class.

(*IX*). Q. Were the decks tight?

A. Yes.

(X). Q. What was the condition of the rivets and stanchions?

A. I only found one stanchion in very bad state at the fore part of the fore hatch which I have ordered to be repaired. Some rivets have been renewed in the other stanchions.

(XI). Q. What was the general condition of the ship as to being staunch and seaworthy, or the reverse?

A. This vessel was staunch and in good seaworthy condition.

(XII). Q. What had been done at Antwerp with a view to preparing the vessel for this voyage?

A. The following are the works executed at Antwerp under my supervision to put the "Babin Chevaye" in good condition:

Drydocking of the vessel. Cleaning the bottom. Two coatings of paint. Lifted the rudder for examination and overhauling the hinges, pintles, etc., of the rudder. Changed two rivets in the back piece of the rudder. Overhauling the steering gear. The vessel having collided with the quay in maneuvering and damaged her port quarter, the tenth frame counting from the after bulkhead had been broken in three places above the waterline in the afterpeak. To repair same we have fitted a butt-strap in going from the lower stringer to fifth rivet above the upper crack. In the holds, replaced some rivets in stanchions, repaired the stanchion at the fore part of the fore hatch, inspected the cement in bottom and found same in good condition. Inspected the decks and their caulking, the masts and anchors, which were in good condition. A small repair was

done to the stock of the starboard anchor. The windlass was examined and repaired. Donkey boiler: Placed 4 vertical boiler stays of 50 millimeters—placed 2 boiler stays to prevent a bulb. Tested by water the donkey boiler up to 11 Kg., found in order. Regulated the valves under steam at 8 Kgs. Donkey engine repaired, changed the pistons on the water end. Tested the engine after repairs.

The above details are taken from my note book in which I mentioned them at the time of the survey.

Mr. Garnuchot then testifies that he is a Lieutenant in the French Navy, and for eleven years has served with the Bureau Veritas, having for his duty the inspection of vessels, the superintending of repairs, and the building of new vessels.

Upon cross-examination Mr. Garnuchot testified as follows:

(1) Q. State how long a time your examination of the "Babin Chevaye" occupied.

A. After so long and after having surveyed so many vessels since 1909, it is difficult for me to reply with precision. All I can say is that the inspection of the "Babin Chevaye" took several days in January, 1909.

(3) Q. For what purpose did you examine her?

A. It is customary when a vessel must pass her survey that the master or owners advise us when she is empty and at our disposal for inspection. This must have been also the case for the "Babin Chevaye" as far as I can remember.

(4) Q. Was it (your purpose) to give her a rating in Bureau Veritas for marine insurance?

A. Yes. A vessel is stated to have a certain rating in certain classes in the Bureau Veritas, that means to say that her build (hull, decks, rigging, engines, boilers, winches and windlass, outfit and all dependences) complies with all the requirements of rules in your possession and that since her building she has been submitted to all required surveys and that in consequence of these surveys she has been found, or has been put in good condition. For full details see the rules marked Exhibit "D."

(5) Q. State what decks you particularly examined and state the method of your examination.

A. I made the general inspection of the decks, examining the main deck, poop deck and forecastle deck by sounding the seams.

(6) Q. Who were with you when you examined the decks?

A. As soon as the vessel to be inspected is at our disposal we have free access on board (as per rules marked Exhibit "D") and need not be accompanied by any one. We make our inspection at the time we think best to do so to see the condition of things or follow the repairs ordered. It is probable that on my first visit on board I was accompanied by some one representing the owner, or some one belonging to the vessel, as this is customary, but I do not remember who was with me, for the reason stated in reply number one. As inspector of the Bureau Veritas I act alone.

(7) Q. How long a time were you engaged in examining the decks?

A. I did not make any note of the exact time occupied in this particular work, as explained in my answer to number one.

(8) Q. Did you examine the seams of the main deck?

A. Yes.

(9) Q. If you did, state if you examined all of them through the length of the ship?

A. *When it is stated that a deck has been examined this means that it has been inspected from fore to aft, starboard to port, in such a way as to examine every part of the deck and completely. This is what I mean by having inspected the decks. This inspection of the decks on the decks was completed by the inspection of the decks in the holds where I examined them underneath to see if there were any leaky rivets. I found none and the caulking was in order.*

(10) Q. If you did not do so, then state exactly what you did do?

A. *I did examine all of the seams of the main deck, as explained in my answer to question number nine.*

(11) Q. How did you examine the rivets and stanchions and what rivets and stanchions did you examine?

A. In passing through the holds I examined all the stanchions and examined if the top and bottom rivets were tight.

(12) Q. Did you examine the rivets of the hull plate?

A. Yes. As customary when a vessel is in drydock. I examined the hull of the vessel underneath and on the sides. I test with the hammer all rivets which do not seem quite in order or doubtful, which condition cannot escape any one who knows what a doubtful rivet is. That is how I proceeded.

(13) Q. If you state you did, state whether

you examined them from the outside as well as the inside.

A. My reply to question number twelve applies to outside examination. As to inside examination I must remark that generally the ceiling and lining and bulkheads hide part of the inside of the hull and that I can only see those places where the plating is bare. I examined particularly the holds to discover leaky rivets. That is how I proceeded. No regulation of any society for the classification of vessels, nor of any maritime country, compels an owner to take down the ceiling and lining every year without having serious doubts as to the state of the rivets in the plating, which demands would arise from the outward examination described in answer to direct interrogatory number twelve.

(18) Q. If in answer to question twelve you state something had been done at Antwerp with a view to preparing the vessel for its voyage, state whether you know what had been done of your own personal knowledge.

A. I know of my own personal knowledge what was done as detailed in my answer to question number twelve.

(19) Q. Were you present when it was done?

A. I followed the repairs and made sure that they were done in good condition.

(20) Q. Who ordered it done?

A. The Bureau Veritas.

The foregoing testimony of Mr. Garnuchot is strongly corroborated by the testimony of Captain Baines, whose qualifications are proved by the testimony of two witnesses in addition to his own (*Hoban*, 190), (*Rehel*, 324). Captain Baines testified in re-

sponse to interrogatory twenty (*Record*, 244, 257) that he examined the "Babin Chevaye," looking for evidence of leakage by decks, or for anything else that was out of order. He then testified as follows:

(21) Q. What did you find on such examination with reference to the decks of the vessel?

A. I found her decks tight from below and on deck I was on the lookout for any suspicious places or signs, but found her caulking good, the decks generally in good condition.

(22) Q. What did you find with reference to the stanchions and rivets?

A. I found nothing wrong with stanchions and no rivets in them deficient.

(23) Q. State generally what was the condition of the vessel with reference to seaworthiness at the time when you made such examination.

A. She was in good condition and appeared to be thoroughly seaworthy.

(24) Q. State your opinion with reference to the equipment of the "Babin Chevaye" for her said voyage beginning February 16th, 1909.

A. So far as I could see the vessel was in every way equipped for the voyage, but this was not in my province.

In response to the twenty-seventh cross interrogatory (*Record*, 249, 264) Captain Baines testified:

(27) Q. Which decks of the vessel did you examine at this time?

A. Whenever, and wherever the main deck was clear, I would look at the seaming and if any place looked suspicious would try it with my knife, and where covered with crew's quarters would get inside and see whether the seams were well filled.

(34) Q. What decks of the vessel did you examine?

A. The main deck. See my reply to question number twenty-seven.

(38) Q. Was your examination and was his (Garnuchot's) examination made with special reference to the seaworthiness of the vessel in classing her for marine insurance?

A. My examination was made more particularly in order to be conscientiously enabled to certify that her caulking was good and her decks tight for the intended voyage. I was instructed to make sure that the vessel was thoroughly seaworthy before her voyage as to stowage of cargo. The Bureau Veritas surveyor can reply for himself. I believe he would be interested as to whether she was entitled to retain her character in the Bureau Veritas books.

The foregoing testimony of Mr. Garnuchot and Captain Baines is strongly corroborated by the testimony of Captain Lebeaupin. The uncontradicted evidence of this witness brings these claimants and appellees within the protection of the Harter Act. He shows clearly that the vessel was staunch, strong and seaworthy and properly manned, equipped and supplied at the inception of the voyage. We quote his testimony as found on pages 53 to 58 of the record:

Q. Captain, what was the condition of the "Babin Chevaye" when she left Antwerp on this voyage?

A. She was staunch, strong and—

Q. Seaworthy?

A. Seaworthy, yes, and good condition of nav-

igability and fit in every respect to make the intended voyage.

Q. What was done with reference to overhauling and repairing the vessel at that time, if you know?

A. She had been examined by one of the surveyors of the Bureau Veritas and two deep sea captains and myself as to her condition, and then the vessel was put in drydock and in drydock all the rivets had been gone over to see if they needed any repair. Only just a few aft which had to be replaced or repaired, and after the vessel had been thoroughly cleaned she was painted with two coats of paint entirely on the outside and the rigging was entirely gone over, if anything was—the rigging was working all right; deck has been examined and all the chains and anchors have been examined to see if they were in good condition; and then of course in general all of the rivets all over the ship were examined and looked after, or looked over.

Q. What was the condition of the stanchions?

A. They were all in good condition, with the exception, I believe, of one stanchion, which required some new rivets.

Q. Were those rivets put in?

A. Yes, the surveyor of the Bureau Veritas made them put it in.

Q. What was the condition of the stanchions and rivets on the vessel when she sailed?

A. In very good condition.

Q. What sort of an examination did you personally make prior to the time when the vessel left?

A. I went all over the ship when she was in drydock and went down in the hold and all over the

deck, examined the deck, examined the seams with my knife to see if they were properly fixed, and went up in the rigging to see if that was in good shape. I found that part of one of the masts was not quite in good condition, so I had the mast lowered to examine and verify exactly what needed repairs. I assisted in examining the donkey engine, with two engineers appointed by the French Consul, who ordered some repairs to be made to that.

Q. Were the repairs made to the donkey engine?

A. Yes, of course, otherwise they wouldn't have given me my certificate.

Q. Were the repairs made to the mast as desired?

A. Yes, everything was found in good condition and had been repaired as ordered by the different surveyors appointed.

Q. What was the condition of the main deck of the vessel when she sailed?

A. In very good condition and perfectly watertight.

Q. What was the condition of the poop deck when the vessel sailed?

A. The same, also; in very good condition.

Q. What was the condition of the hatches and their coverings when the vessel left Antwerp?

A. They were in very good condition; there were three tarpaulins on each hatch and during the bad weather I had a breakwater built over the main hatch, to protect the tarpaulins.

Q. Were these tarpaulins watertight?

A. Yes, of course.

Q. Were any of them new?

A. The two lower ones were absolutely new, and the third one on top, to protect the others, had already made one voyage.

Q. What was the condition of this third tarpaulin?

A. It was in good condition, too; it was watertight, just the same.

Q. When was the "Babin Chevaye" built?

A. 1901, the same as that.

Q. What is the life of a sailing vessel as a first-class sailing vessel, how long is she ordinarily rated as a first-class vessel?

A. From fifteen to twenty years.

Q. Is she ordinarily used after the expiration of fifteen or twenty years as a sailing vessel of any other class?

A. Yes, she can go down into second or third class; all depends on the condition she is in and whether the repairs prescribed by the Bureau Veritas have been executed.

Q. How was this vessel manned when she left Antwerp in February, 1909?

A. Twenty-five men, all told, among whom three officers, two boatswains, one mechanic—

Q. Carpenter?

A. Well, the man who runs the donkey engine, engineer, sort of engineer-carpenter, and the balance are sailors, and one novice, or one layman, you might say.

Q. Apprentice?

A. One apprentice, yes.

Q. State whether or not these men were competent to perform their several duties.

A. Yes, they were all good sailors, and capable of doing their duty.

Q. Was the first mate a competent navigator?

A. Yes, he had a license of deep sea captain, and I believe he had navigated for fifteen years.

Q. What can you say as to the second mate?

A. He was authorized—had a license to navigate sailing vessels on the French coast; a certain distance from shore, according to the prescriptions of the law, he was in command.

Q. Was he qualified and capable of performing the work which fell to him on the voyage in question?

A. Yes, of course.

Q. Did the ship carry—well, he has stated she carried a carpenter. What can you say as to the qualifications of the carpenter?

A. For years he had worked in different ship-building yards where he was principally employed as caulker and for the last years he has taken to navigation.

Q. Did he know his business?

A. Yes, very well.

Q. State whether or not this complement of officers and crew was adequate to the proper navigation of the vessel .

A. I had one man more than is generally required; twenty-four is the usual requirement.

Q. Would twenty-four have been sufficient?

A. Yes, that would have been sufficient.

Q. How was the "Babin Chevaye" equipped for this voyage?

A. Had on board the chain, anchors, life-boats, sails and all the necessary material required to make repairs, substitutes for the pumps and supplies to last one year.

Q. What was the condition of the pumps?

A. They were in very good condition and of the latest model.

Q. State whether or not she carried fuel for the use of the donkey engine and for other purposes.

A. I had thirty tons of coal.

Q. State whether or not that was sufficient.

A. Yes, amply.

Q. State whether or not the vessel was supplied with whatever was needful to her navigation and the proper care of her crew.

A. Yes, I gave the orders myself in Antwerp to put enough material to replace and provisions on board to last me one year.

The testimony of the foregoing witnesses is corroborated by the circumstances in this case. It appears from the testimony of Captain Lebeaupin that the bad weather started on the 18th of April (*Record* 68). Although the decks were covered with water during much of the time from and after the 18th of April, the pumps remained clear and there was no indication of any leakage in the vessel until after the severe storms encountered on the 5th of May and the ten days immediately following that date. (*Record*, 68-69.) Furthermore, as we have elsewhere shown in this brief, the cargo consisted in large part of perishable merchandise. There was considerable grain, talcum, ochre and Venetian red. No claim is presented for any damage to this perishable portion of the cargo. The coke must have been somewhat damaged if any considerable amount of water had got on it, but no claim is presented for damage to coke. The

cargo was very largely a cargo of iron and steel and the only damage claimed to the iron and steel is \$597.00 (Libellants' Exhibit "A"), manifestly a small fraction of the value of the metal portion of this cargo. Of 4,940 barrels of cement contained in the cargo, but 224 barrels were lost (Libellant's Exhibit "A"). Clearly the damage must have been far greater than this if the decks of the vessel had been leaky when the voyage began. This fact will be the more apparent when we consider in detail the history of the trip and the character of the weather which this vessel encountered.

Libellants offered evidence to show that the top thread of the caulking on the main deck was not in good condition when the vessel reached Portland. The evidence was to the effect that there are five or six threads in the caulking of a seam and that generally speaking only one of these threads, the top one, was taken out (*Jordan*, 143-144). Captain Lebeaupin explains this condition by the fact that the deck had been under water a large share of the time during the voyage in question and that the pitch in the oakum at the top of the seams had rotted somewhat (*Record*, 202-204).

Q. Captain, were you present on the "Babin Chevaye" when she recaulked in Portland, in the fall of 1909?

A. Yes, most of the time.

Q. Did you observe the condition of the upper thread of the caulking which was removed on a portion of the vessel at that time?

A. Yes, I have.

Q. State what was the cause of the condition of the thread which was removed.

A. (Through interpreter) He says there are two reasons for it. The first reason is: That during the three months that I was in bad weather the outside surface of the wood deck became soaked and communicated the moisture to the pitch, and made it rot a little. The second reason is: On account of the straining of the vessel, the seams of the deck opened up in certain places, and because the water could not get right through the seam down between decks, it followed the seams into the deck that had become soft; and as soon as the oakum once gets wet or soaked it rots gradually, and in every—at least only one thread had become affected.

Q. What was the condition of the other threads in the caulking underneath the top thread?

A. I don't know what the condition of those was, but it can be assumed that they were in good condition, because the iron that we put into it couldn't reach the bottom of it. The deck from aft until as far as the forecastle was in bad condition, but the other part from forward of the forecastle was perfectly intact, was in good condition.

Q. What explanation can you give for the difference?

A. The reason for that is that the after deck, the part that has been ordered to be recaulked was practically never free from water except probably one week in the whole three months of bad weather, whereas the front part very seldom was under water.

Q. What is the fact as to how tight—the main

deck of this vessel was under water during these three months, while the weather remained bad?

A. As far as I can remember, only a few days it was dry.

Q. How much of the day would the deck be covered with water?

A. During the bad weather, the deck was all the time under water; not exactly covered up to the bulwarks, but there was water on the decks right along during the bad weather days.

Q. During the whole 24 hours?

A. Yes.

CAULKING POOP DECK.

The contention of libellants with reference to the decks of the "Babin Chevaye" is based on the fact that some caulking was done to the poop deck after the vessel had been at sea several weeks (*Lebeaupin*, 66), (*Rehel*, 337-338). This matter is fully explained by Captain Lebeaupin. We have quoted his testimony on page 55 of the record, to the effect that the poop deck was in excellent condition when the vessel left Antwerp. He testifies on pages 65-66 as follows:

Q. How were the seams on the poop deck caulked when the vessel left Antwerp?

A. You mean what condition the seams were in?

Q. No, what material were they caulked with?

A. They were caulked with oakum and putty.

Q. State what is the proper material for the caulking of the seams of the poop deck.

A. It is generally left to the captain, and, in my opinion, I prefer to have putty.

Q. What effect did the heat in the neighbor-

hood of the equator have on the caulking on the poop deck?

A. When we passed the equator, the wood dries out, and the putty gets dry and sometimes some small leaks are caused, which are repaired; and, if we had pitch on there, the heat would melt this, and there would be nothing left at all. It would be all running over the decks.

Q. What happened on this particular voyage, with reference to the seams of the poop deck, when the vessel got in the neighborhood of the equator?

A. I discovered a few leaks which I had repaired after the rains were over.

Q. What was the condition of the vessel after this—what was the condition of the poop deck after these repairs had been made?

A. Water tight.

Q. What had been the condition of the weather prior to the time when these repairs were made?

A. I had had normal weather and very warm near the equator.

Q. Had you had any storms prior to that time?

A. No.

Q. Had there been any indication that the vessel was leaking up to that time?

A. No, none whatever.

An examination of the plan of the vessel, as shown on claimant's Exhibit "2," and on which the poop deck is marked in red ink, will show the court that leakage in the poop deck could not damage this cargo as long as the main deck remained intact. The testimony of Mr. Garnuchot on this subject is clear and uncontradicted (See *Record*, 297, 307-308).

(22) Q. Was it possible for leakage in the

poop deck to damage the cargo of the "Babin Chevaye" if the vessel remained in other respects tight, staunch, and seaworthy?

A. It was not possible for leakage in the poop deck to damage the cargo of the "Babin Chevaye," otherwise not only the poop deck must have leaked (and this was in order as per my survey), but also the main deck must have leaked, which was also in order. The main deck is protected by the poop deck.

Captain Baines testifies on the same subject (*Record*, 245, 258):

(29) Q. State under what deck the cargo of the "Babin Chevaye" was stowed.

A. Under the main deck.

(30) Q. Was any of the same stowed under the poop deck?

A. No.

(31) Q. Was it possible for leakage in the poop deck to damage the cargo of the "Babin Chevaye?"

A. No, unless the main deck leaked.

Captain Baines further testified that it was usual to caulk the decks of sailing vessels at sea as conditions arose which seemed to call for it. (See his testimony, 245, 258-259).

(32) Q. Is it usual to do caulking on the poop deck during the voyage?

A. Yes.

(33) Q. Are there any reasons for caulking the poop deck on the voyage rather than in port?

A. Yes. In the trades an excellent opportunity to caulk this, or any other deck, is availed of and as a rule is only done when the weather is fine.

It is quite customary in all vessels to caulk wooden decks at sea.

He testified on cross-examination as follows:

(*Record*, 250-251, 268-269).

(50) Q. If you say it is usual to caulk a poop deck during the voyage, state also whether it is usual to do any other deck caulking, during the voyage. If so, what caulking?

A. Quite customary in sailors and steamers to caulk any parts of the deck, which after passing through stormy latitudes may show that it is necessary or advisable so to do. The caulking done at sea is generally well done by the ship's carpenter and in fine weather only and better done than when in port when contracts cause the work to be hurried.

(51) Q. Have you ever known the main deck to be recaulked after the commencement of a voyage?

A. Yes.

(52) Q. If you say you have known such recaulking to be done state the facts and circumstances.

A. Seldom is a voyage made but a supply of necessary stores is shipped for the purpose and used in the fine weather of the voyage. It is a general custom.

(53) Q. Is it not true that vessels prefer to do their own deck re-caulking during the voyage with their own crew, to save expense?

A. They have their crew and must keep them employed profitably and avail themselves of fine weather to keep ship in repair. Same may be said of repairing sails, and of course they make what economies they can and get better results.

STORY OF VOYAGE.

Appellees concede the rule that the law requires a vessel to be reasonably fit for the voyage she is about to take. The courts have repeatedly said that a ship owner must know that a vessel is apt to meet with rough weather in making her voyage; but the story of the voyage of the "Babin Chevaye" in the year 1909 takes it completely out of the operation of this rule. The voyage was tragic in the extreme. It cost the lives of two members of the crew, maimed three others and the entire vessel narrowly escaped shipwreck. We are unable to see how any court can read the story of this voyage as detailed by the witnesses Rehel, Lebeau-pin, and Grennapin, without reaching the conclusion that this was an extraordinary voyage, and that the stress of weather encountered by the vessel was severe beyond anything that the owners of the ship could anticipate, and beyond their power to guard against. The stress of wind and wave encountered by this ship on her voyage from Antwerp to Portland is abundantly sufficient to account for the small damage sustained by this cargo.

We assume that the court would prefer to read the story of the voyage in the language of the witnesses, and we shall therefore not attempt to paraphrase it. We quote:

CAPTAIN JOSEPH LEBEAUPIN, (*Record*, 68-86):

Direct Examination.

Q. The condition of the sea on the 18th of April, 1909?

A. Bad weather, running sea, violent lowering.

The deck is constantly covered with water, and try to change the course of the vessel by changing the sails so as not to roll so much.

Q. What was the latitude at that time?

A. 43 degrees south.

Q. What was the condition of the sea on the 29th of April, 1909?

A. Strong wind from the east, southeast. The waves continuous, would ship on the vessel. The vessel continuously ships waves. The deck is constantly full.

Q. What were the conditions on the first of May?

A. Very bad weather. The vessel experiences severe strain on account of the condition of the sea. Violent rolling, causing fears for the safety of the cargo. The deck is constantly swept by seas. Vessel strains very much, both in masts, rigging and sails. The barometer sinks two degrees, which is very rare; two degrees an hour, which is considered very rare.

Q. What was the condition on the 2nd of May?

A. Sudden change of wind, violent rolling, and the deck is continuously covered with water.

Q. What indication did the pumps give, if anything on this day, as to whether the vessel had, up to this time, leaked any?

A. So far pumps are always clear, according to the books.

Q. What did that indicate as to whether the vessel had leaked any up to this time?

A. No, it indicated there were no leaks.

Q. What were the conditions on the fourth of May?

A. 10 P. M. a storm is blowing; the vessel behaves very well, in spite of the fact that the deck is constantly covered with water.

Q. What was the condition of the wind on that day?

A. The weather was very strong, quoted here as nine, the maximum being twelve.

Q. That is the wind?

A. The wind was very strong, and is quoted here as nine, showing the degree of strength of the wind, the maximum wind being generally twelve.

Q. What were the conditions on the 5th of May?

A. The storm continues, and I am obliged to take sails in. The deck is constantly full, from starboard to port side. At 5 P. M. the storm increases in violence, sea is very high, and the seas cover the deck from one end to the other, and, in order to avoid accidents, I am obliged to let the ship sail with the waves.

Q. What were the conditions on the 6th of May?

A. Two days before it had been storming right along, and I was sailing under—

The sea was literally mountain high. Decks were absolutely covered with water, and I couldn't tell whether the vessel was taking on water from one side or the other, because the water was running all over.

Q. At seven in the morning what happened?

A. The wind is blowing a gale; the break water on the main hatch is carried away by the sea.

Q. Was that the break water which you constructed yourself on taking command of the vessel?

A. Yes.

Q. Did this—did the washing away of this break water, let water into the main hatch?

A. No, because the tarpaulins remained—they were still there.

Q. What effect did this sea have on the vessel?

A. Considering the condition of the weather, the vessel behaved very well, and answered the helm.

Q. How were the pumps?

A. The pumps were clear.

Q. Proceed and tell what happened on that day and what the condition of the sea and weather was from time to time.

A. I never saw such a strong wind, and high seas as on that day. At noon there was a let-up of the bad weather which made us hope that the storm would abate, but about 3:20 P. M. the vessel was caught by two tremendous waves. The first one didn't hit the vessel, but lifted the bow so far out of the water that the stern went out, went way down into the water, and the second wave at that same moment, landed on the poop deck, broke in the steering box cover, broke a few spokes in the wheel, smashed the door of the chart room, and also the wall in between the staircase and the chart room, carried away everything there was in the chart room, maps, and everything movable, and I had just entered the chart room five minutes before, and so I was swimming around in the chart room. The water descended the staircase, and covered all the quarters and the saloon with a foot of water. The two men that were at the wheel were carried away, Gallen and Jaoeum. Gallen was found a little ways off—Gallen was found a little ways further on the deck with his arm broken. The second mate

was swept over the entire poop deck, and recovered at the bottom of the staircase with a broken leg. The carpenter, Quelen, was also carried away and was found near the rail with already two legs overboard, and just—and he was assisted just in time by another sailor, who was Riou—who was standing near the chart room. He had his jaw smashed. Fortunately the first mate, the first boatswain, who stood near the wheel, grabbed the steering wheel, because otherwise all of us and the ship would have been lost. And as soon as I could get out of the chart room, I had the other men of the watch called so as to assist him, and I discovered that two men were missing, and after consulting with the entire crew, it was decided that it was impossible to save the two men, and as soon as I was able, I—a few hours afterwards, as soon as I was able, I had the water removed from the quarters and the salon, but there was so much water in the sail room that it had already leaked down to the between decks.

Q. Will you point out on Claimants' Exhibit 2 how the water went down from the chart room into the sail room, and from the sail room into the cargo?

A. The water came over here, over the poop deck, stove in the door of the chart room and the wall, and went down the staircase, and there was one foot here; in the aft quarter was one foot of water. The water went down the little hatch in the sail room, and got into the between decks, and it had dispersed itself over the entire between decks, over the steel, because in between decks, there is a large plate of iron to reinforce the vessel, and the water has followed this plate further than half the vessel—the middle of the vessel.

Q. The plate of iron you speak of is in the vessel for what purpose?

A. To reinforce, to strengthen the vessel.

Q. State what the hatch leading down into the sail room and the store room is used for?

A. Nearly every moment we have to go down there—either for provisions or for sails, or for material to make repairs, and at the time that this water came down the hatch—came down the staircase—one man had just opened this little hatch and was down there to get something to repair the sail that had been torn.

Q. Is it possible, in the practical navigation of such a vessel as the "Babin Chevaye," to keep that particular hatch battened down?

A. No, we couldn't do that, because we have to pass through it too often, and it is very seldom that any water would go down there except in case of an accident.

Q. What was the construction of the wall and door of the chart room prior to the time when this storm was encountered?

A. The door and wall were in good condition, and in the eight or nine years that the vessel had been at sea, there had never been any damage done to it.

Q. What was the condition of the wheel house prior to the time that this storm was encountered?

A. Very good condition also, and additionally secured with ropes, tied down.

Q. What did you do with reference to repairing the damage to the wall and door of the chart room?

A. I made a strong door which would slide back and forth, and the inside wall I have not re-

paired because—I repaired that temporarily with sails to be able to show the damage done, to the receivers of the cargo.

Q. I didn't understand. What does he mean by that?

A. It was on the inside, and consequently was not absolutely necessary to repair that, and I only repaired it temporarily.

Q. How soon did you make the temporary repairs that you speak of?

A. Next day.

Q. When you got the new door constructed, what was the condition of the wall of the chart room as to whether it was water tight, and would keep out the sea?

A. You mean the wall and the door?

Q. The wall and the door. I think you said the wall was damaged.

A. On the inside.

Q. What was the condition of the door of the chart room?

A. It is very seldom that water is shipped on the poop deck, but as it was, it was properly repaired, but probably not absolutely water tight. Couldn't be absolutely tight, because the door had to be removed once in a while, whenever anybody had to pass.

Q. Was it possible for you, under the conditions to make any better repairs than you did?

A. No, not while at sea.

Q. Now, what were the conditions on the 7th of May?

A. The weather improves a little, but the seas are still so high, that it is impossible to gain any

headway. The vessel is rolling to such an extent, that fear is entertained for the safety of the sails.

Q. Was an inspection made of the masts and rigging on that date?

A. The 7th of May, you say?

Q. Yes.

A. Yes, we replaced the broken stays, and made an examination in the masts.

Q. What were the conditions on the 8th day of May?

A. Gales, considerable rolling. The weather--- the vessel strains very much, as well as the rigging and the masts. Obligated to sail with the wind behind, on account of the condition of the sea and of the wind. The deck is absolutely full. During the entire day, we had to sail with the wind from behind for the safety of the vessel.

Q. What did the pumps show on this day?

A. The pumps show an increase of five centimeters water in the hold.

Q. Five centimeters is how many inches?

Interpreter: About one and a half, I think.

A. It is impossible when the vessel is rolling as she did at that time to get at the exact quantity of height of the water in the hold, because the entire pump is naturally soaked at the bottom with water, and it is impossible to get at the right height in one place.

Q. What were the conditions on the 9th of May?

A. The same kind of weather, the vessel strains heavily, rolling, and a few seas are shipped.

Q. What were the conditions on the 10th of May?

A. The weather was improving considerably, the wind has let up, but the vessel still suffers from severe rolling on account of the mountain-high seas, which strain the vessel. On that day, we visited the hold, and found five barrels of cement loose.

Q. What was done with reference to these barrels of cement?

A. We have re-stowed them, and the entire after end of cement discovered to be wet.

Q. What were the conditions on the 12th of May?

A. Weather awful. Very heavy sea, taking the ship from the side, and straining enormously the masts and the rigging. Violent shocks felt through the heavy rolling, shocking the ship from the stem to stern. The deck is completely full.

Q. When you say the deck was completely full, what do you mean?

A. I mean by that that the deck was entirely covered up to the bulwarks, and that water runs over the hatches, and that the deck—that the vessel ships water from the lee side as well as from the off side—what do you call that?

MR. McCAMANT: The windward side.

A. The windward side. At 11 A. M. it is impossible to continue our course. We steer with the wind.

Q. What was the condition at 1 P. M. on that day?

A. Weather awful. I just mentioned that.

Q. What was the condition at 9 P. M. on that day.

A. A jump of the wind from west to north-west, and on account of the change of the wind, the vessel shipped some water.

Q. What happened to the railing of the poop ladder?

A. The poop ladder was carried away as well as the covers of the life boats. The third tarpaulin of the main hatch was carried away, and also the tarpaulin of the man hole of the pump was torn and carried away.

Q. How about the other two tarpaulins on the main hatch?

A. Those remained intact.

Q. Did they remain water tight?

A. Yes, certainly.

Q. What happened to the port side of the deck house?

A. The deck, you say, the deck house?

Q. The port side of the deck house, the 12th of May.

A. Oh, the port side of the deck house was entirely dented in.

Q. What was the construction of this side of the deck house prior to the storm?

A. She was in good condition, and one centimeter—no, one-half centimeter, I think—one-half centimeter thick of steel and reinforced with additional iron.

Q. What was the condition of the railing of the poop ladder prior to the time this storm was encountered.

A. Very good shape, built of good wood.

Q. Captain, what was the weather on the 13th of May?

A. The sea was still high, and the rolling continues, and the deck is completely flooded.

Q. State what the conditions were on the 14th of May?

A. The weather improves considerably, and we can get on the deck, and as soon as this was possible, I made an examination of the vessel with the officers of the watch. The cement of the stanchions around the main hatch was broken, and the bulwarks have been stove—have been bent toward the main hatch, and the majority of the rivets of the stanchions have been broken in this particular place. One had entirely parted, causing considerable leak which had made an opening there during the 48 hours, during which time the storm lasted.

Q. What had been the condition of the decks with reference to the washing of water during that 48 hours?

A. During this 48 hours the decks were completely flooded, and it was impossible for anybody to be on deck.

Q. Would it have been possible to make any repairs prior to the time when this examination was made?

A. It was impossible, and besides I didn't know on account of inability to get on the deck.

Q. What did you do when you found the rivet missing?

A. I closed it up immediately with wooden peg, while at the same time, I had a new rivet made; and after my visit on the deck, I went down into the hold. We have discovered several leaks as a result of the straining of the vessel. Among others, that the rivets at the foot of the stanchions and around the foot of the hatches, and also of the deck house; and because we couldn't even descend into the hold—and where the leaks were at the rivets, I had those surrounded with hemp lead and

hammered the lead down. After I had them retightened, several barrels of cement, which had gotten loose, were restowed and refastened; and I also discovered that a few cases of whisky had become wet, and an increase in the water in the pump.

Q. Did you work the pumps?

A. Yes, yes, on account of the rolling of the vessel, I couldn't yet discover any more than 15 or 20 centimeters, and the next day when the weather was lying straighter, didn't roll so much, I found 20 centimeters. So, with the entire crew, I had as much water pumped out as possible, and because I couldn't get enough water out of the hold, I had the donkey engine lighted—the fire—so as to pump the water out with that.

Q. Did you succeed in getting the pumps clear eventually?

A. Yes, on the 18th of May, the pumps were clear.

Q. Now, generally, what was the weather between the 14th of May and the 20th of May?

A. Well, that is the same weather. We had about two or three severe blows during the week.

Q. State how the weather which you encountered between the 29th of April and the 20th of May compared with other weather that you had struck in your experience as a seafaring man?

A. As far as I am personally concerned, I never saw such severe weather, and such severe storms, and high seas as on that trip, and particularly during such a long time, and all the men on board agreed—were of the same opinion.

Q. Well, what the other men said will not be competent. State whether or not these weather con-

ditions were the ordinary stress of weather that a ship ordinarily expects in making that voyage, or whether they were other and different from the ordinary conditions.

A. It was a bad series—a continued series of bad weather. And I never saw it last so long, at one stretch.

Q. Now, when did the vessel get to Hobart-town?

A. 29th of May.

Q. What was done with the disabled members of the crew?

A. The three men that were injured were immediately taken to the hospital.

Q. What was done with reference to repairs on the vessel when she reached Hobart?

A. As soon as the ship had thoroughly dried out, I tried the pumps, to find if they were clear, and otherwise how much water there was in the hold, and to find if there was any increase in the water. All the rivets and stanchions had been repaired, and in order to examine the leaks in the deck, we had fire hose turned on the deck, and one of the mates was sent down in the hold to see if there was any leaks, and in those places where any leak was suspected, or noticed, the deck was entirely recaulked in that place. All the hatches were opened to let the cargo, or let the hold dry out, and we restowed the cargo where it was necessary; the barrels that were loose were restowed.

Q. When did you leave Hobart?

A. The fifth of June.

Q. What was the condition on the 9th of June as to the weather or the sea?

A. Severe blow of the wind. The sea was

very rough, and the vessel pitches and rolls and the deck is constantly covered with water.

Q. What were the conditions on the 10th of June?

A. Storm continues. The wind is blowing a gale, and the water is swept over the sea like steam or smoke.

Q. Over the sea or over the ship?

A. Over the sea. The vessel strains severely; the entire day the same condition.

Q. Was it possible to stay on deck that day?

A. No, no, it was impossible to be on deck.

Q. What, in a general way, were the conditions as to the weather between the 10th of June, and the 1st of July?

A. More or less the same conditions as before—severe rolling and heavy blowing and high seas, and about two severe—off and on a little good weather.

Q. Take the voyage in general from Antwerp to Portland, and state how it compared in the stress of weather which you encountered, with other voyages which you have taken.

A. It was the first time that I rounded Cape of Good Hope, and I came around Cape Horn sixteen times, and I never saw such bad weather as on this trip.

Q. Which Cape is ordinarily more stormy to round, Cape of Good Hope or Cape Horn?

A. The Cape Horn route is the worse route than Cape of Good Hope, but as a rule, you get through quicker. The bad winds last less. Cape of Good Hope you remain for three months in bad weather, or in bad winds.

M. A. F. REHEL (325-332.)

Direct Examination.

Q. Who kept the log book of the vessel during her voyage from Antwerp to Portland?

A. It was kept by me as first officer, and by Mr. Collet as second mate up to May the 6th, because he was injured and replaced on that date, and until the arrival in Portland by Mr. Viaud who was promoted to second mate.

Q. Refreshing your memory about the entries in the log book of the vessel, I wish you would describe the weather which the vessel encountered from and after the 18th of April?

A. I can state that beginning about the 18th of April, that we have constantly had bad weather, and before; the weather on some days was better. The sea was so high and so much swell which made the vessel roll considerable, and if I remember right, we had a storm that week, particularly Wednesday and Thursday.

Q. State whether or not the weather strained the masts and rigging?

A. Yes, the masts were strained by the heavy rolling.

Q. State whether the decks were flooded by the high seas, and if so, how often?

A. During the storms it was impossible to be out on deck, it was too covered with water.

Q. How long did these conditions continue after the 18th of April?

A. We had bad weather ever since the 18th of April, and up to the time that we were about the level or about the height of Chile. We had bad weather up to the time that we were off the coast of Chile, 25 degrees south latitude, though

the stormy weather continued until we reached the 37 degree south, which was on the 10th of June.

Q. I direct your attention to the 5th of May, and will ask you what the weather conditions were on that day?

A. I was on watch from 8 P. M. until midnight; the wind became strong during the evening and obliged us to sail before the wind, and during the following day the wind was very high, there was a strong wind, and in the morning when I was again on watch. I left the watch at noon and was replaced by Mr. Collet, who was second mate, about half past three a tremendous wave hit the vessel which had been noticed before by two men which were on watch on the deck. Two men at the wheel, and two other men standing next to them for assistance, the officer of the watch and second boatswain were on the poop deck at that time. This tremendous wave landed on the poop deck and tore the vessel house or wheel cover off and carried away two men, namely, one man at the wheel on the port side, and one of the other men which was standing near for assistance. The carpenter who was also standing near, was thrown violently against the rail, and he was assisted when he had already his legs overboard. He was caught by Riou, who was the man who had noticed the big wave coming.

Q. Who else were on the poop deck at the time this wave came?

A. Besides those men which were lost, there was two men also on the poop deck, both of whom noted this big wave coming, one called the attention of the other to it, so that there was in all, eight men on the poop deck when this big wave landed on the ship.

Q. What were the names of the two men which were lost?

A. Jaouen and LeFur.

Q. State whether any one was hurt by the wave in addition to the two men who were lost?

A. I have not finished quite with what I was saying.

Q. Proceed.

A. The second mate was thrown against the railing of the poop ladder. The man who was at the wheel on the port side was found afterwards near the rail of the poop ladder with one of his legs broken. This same man by the name of Gallen also came on deck in contact with the wreck on the poop deck, and he suffered internal injuries on that account.

Q. What was done with Mr. Gallen?

A. He was immediately taken to the saloon and received all possible attention that could be given him.

Q. Where was he left?

A. He remained in the saloon until the vessel reached Hobart.

Q. Was he left at Hobart?

A. He was left at a hospital at Hobart.

Q. Continue your testimony with reference to the storm on the 6th of May, and the injury done to the cargo, if any?

A. The carpenter had his jaw smashed, and the second boatswain was the only one that then remained at the wheel, and he called in the assistance of the two men that were near the chart room on watch for assistance. They were asked to assist in clearing away the remnants left around the wheel because they interfered with the steering of

the ship. They all remained at the wheel until they could be relieved by change of the crew, because one part of the crew is on the poop deck and one part of the crew was on the deck down below, so they maintained the ship on its course until they were relieved.

Q. State what effect this storm of the 6th of May had upon the vessel, or upon her cargo?

A. The storm or wave which landed on the ship on this day carried away the wall of the chart room, and also the wall inside, and all the apartments aft were filled with water, and the chart room was absolutely flooded, and everything was carried away.

Q. State whether it strained the vessel, caused it to leak water?

A. The water entered through the chart room, and went into the saloon and the sail room, and it had naturally no outlet unless it got down into the ship; but everybody was working hard to get the water out of the saloon as fast as possible.

Q. What was done in the way of repairing the damage done on the 6th of May?

A. The first thing that was done was to cover up again the chart room by a temporary door which was placed there.

Q. What else was done?

A. The wheel was working well yet, and the persons on the poop deck, as soon as the weather permitted it afterwards they have gone down in the hold to see what damage was done to the cargo.

Q. What did they find on examination of the cargo?

A. It was found that one of the stanchions

was broken, and this was replaced by a new one so as to close up the opening.

Q. What evidence, if any, did they find of there having been sea water in the cargo?

A. All we could discover at that time was that the water had gone through the opening where the stanchion had broken and had fallen down on the barrels of cement.

Q. State what the weather conditions were after the 6th day of May until the vessel got to Hobart town, Tasmania?

A. We had at least one heavy storm once a week with constantly high seas.

Q. State how long the sea remained disturbed with the swell after such a storm as came once a week on this voyage?

A. There are different causes by which the sea can remain high; sometimes 48 hours before, and sometimes 48 hours after a strong gale. I want to mention that by a strong gale, I mean a real storm.

Q. State whether or not there was any other storm which strained the vessel as much or more than this storm on the 6th of May?

A. Yes, certainly, we had stronger storms or worse storms later on.

Q. How did the weather on this voyage from Antwerp to Hobart town compare with the bad weather that you have experienced on other voyages in your 19 years or so of seafaring life?

A. It is the only voyage in my experience which I have made where we have suffered so much as on this particular voyage.

Q. What was the weather that the vessel en-

countered on her voyage from Hobart town to Portland?

A. I mentioned before that we had stormy weather until we reach the 37th degree south latitude.

Q. What was the effect of the bad weather after you left Hobart town on the vessel with reference to her straining and laboring?

A. We suffered several stormy days after leaving Hobart, and during every storm the ship was badly strained, and particularly also on those days that the sea was very high when the vessel rolled.

Q. What caused the vessel to roll?

A. The high sea and the swell rather than the wind.

Q. State whether in these storms after leaving Hobart the decks were flooded at every storm?

A. At every storm the decks were covered with water.

Q. What, if anything, was done with reference to the care of the cargo on the voyage from Hobart to Portland?

A. We decreased or moderated the canvas so as to decrease the effect of the strain as much as possible.

Q. Was any examination made of the cargo from time to time between Hobart and Portland?

A. Yes, every time that the weather would permit, the hatches were opened so as to allow an examination of the hold or cargo.

Q. What was done with reference to the cargo on these examinations?

A. All we did was to watch and rewedge any of the cargo where necessary.

Q. Prior to the time when the vessel reached

Hobart town, what was done with reference to pumping out the hold as it filled with water from leaks?

A. The pumps were sounded at every quarter, and when any water was found we pumped until they were absolutely dry.

Cross Examination, 346.

Q. How many times have you been around the Horn?

A. Three times by Cape Hope and three times by Cape Horn.

Q. How many years at sea?

A. Nineteen years.

Q. Did I understand you to say that this was the worst weather you ever saw?

A. Yes, indeed it was.

Q. Do you refer to these two particularly heavy storms, or to the whole voyage?

A. Especially with regard to those two heavy storms we had, and also as regards the number of days,—I never saw so many during a certain period.

F. M. GRENNAPIN (348-353.)

Direct Examination.

Q. Describe the weather on the voyage after the 18th of April, 1909?

A. I can give a description more or less, but to the best of my memory it is this, that it was very bad weather.

Q. Describe the weather on the 6th of May?

A. On the 6th of May we took in the lower top gallant sail—the wind became stronger, the sea very high and rough—the wind still became stronger—the sea became still higher,—the second mate, Mr. Collet, sent me to see if the hatches were prop-

erly secured at the corners,—there are three hatches, one two and three. At three twenty P. M. I reported that nothing had moved. At 3:30 he sent one of the seamen to look out. Shortly after that a big wave hit the ship aft. I was with the second mate on the starboard side. I said to him “Look at that big wave ahead of our ship.” I was standing next to Gallen, one of the men at the wheel; just when I had finished making my remark the wave hit the vessel and destroyed the wheel box, and sent the two men at the wheel flying over the poop deck, the second mate, the carpenter and the other ordinary seaman also, while I was standing near the two men at the wheel I had my hand on the wheel, and therefore at once seized it to hold the ship in place, and when I recovered from the first shock I saw the door of the chart room smashed in, as the wave was stronger on the port side than on the starboard side. The wheel box was carried over to the starboard side and its position prevented the wheel from being properly operated. I had to take it down entirely in order to free the wheel. Soon afterwards I called for two men to replace me. I then found the second mate on the starboard side near the poop ladder. He told me one of his legs was broken. In the meantime the men off duty were called on deck at once, and I ordered that Mr. Collet be at once taken to the saloon. The other injured men were likewise taken downstairs. We placed on the poop deck lines or ropes so as to pass along afterwards safely. Then it was ordered that oil be thrown forward of the ship during 48 hours.

Q. State whether the storm continued during all those 48 hours?

A. The storm lasted until 24 hours after this wave came on board the ship.

Q. Was the deck under water any portion of that time?

A. Yes, it was impossible to be out on deck.

Q. State whether the damage done by this wave particularly in staving in the chart house door and partition, let the water into the hold onto the cargo?

A. Yes, there is no doubt of that, and also some stanchions were broken on the port side.

Q. What would be the effect of breaking the stanchion with reference to letting water down into the hold?

A. It would be hard to tell how much water would go down through the stanchions, because it is pretty solid.

Q. What caused the stanchion to break?

A. The big sea.

Q. What was done with reference to repairing the stanchions and how soon was it done?

A. Yes, they were repaired as soon as it was possible to get out on deck.

Q. What was done with reference to the damage to the chart house and making the deck tight at that point,—I mean fixing it so the water washing over the deck would not go down through the stairway at that point?

A. Yes, the first mate immediately made a temporary door,—a sliding door.

Q. How much water went through the deck and down the stairway before those repairs could be effected to the chart house?

A. I do not know, because I had more im-

portant things to do than to watch how much water went down there.

Q. Describe the storm of May the 12th?

A. I remember that on the 12th of May we did not continue on our course, but laid still, or at least, turned with the waves, the sea was very high then.

Q. State whether the sea was washing over the decks at that time?

A. Yes, it was impossible to be on deck.

Q. What, if any, damage did that do to the stanchions of the vessel, or any of them?

A. I do not remember exactly whether the stanchions were broken on the 12th of May, but it was during one of these storms, but I would not be certain which.

Q. How did the weather on this voyage compare with other severe weather that you have experienced on other voyages?

A. In all my 16 years of navigation I never saw such bad weather, and so long bad weather.

Q. What was done when the ship got to Hobart in the way of repairs?

A. Yes, we removed the cement around the stanchions and repaired the rivets, and bolts down below the deck, and then let water run over the deck so as to examine into the places where water would come through where there were leaks.

Q. When the leaks were discovered what was done?

A. They were repaired.

Q. Were all the leaks repaired?

A. Yes, all the leaks were repaired.

Q. What was done during the voyage from

Antwerp to Hobart with reference to the care of the cargo?

A. As soon as the weather would permit the captain himself sent the first mate down into the hold to see if any barrels needed rewedging and resecuring. Sometimes some of the barrels would get slightly loose and they were resecured again, but not many.

Q. What was the effect of the bad weather with reference to the straining of the vessel?

A. The weather from Hobart to Portland was not as bad as that from Antwerp to Hobart, but nevertheless the vessel suffered some straining.

The lower court and ourselves are not alone in the belief that the foregoing testimony proves a case of damage due to perils of the sea. The testimony affirmatively discloses that this was the opinion of Mr. Alfred Tucker, who is admitted to be the general agent of libellants at the Port of Portland, with full powers (*Record* 131). Captain Lebeaupin, in the presence of Mr. J. W. Matthes had an interview with Mr. Tucker on this subject. Captain Lebeaupin testifies (122-124) :

Q. Did you have any conversation with Mr. Tucker with reference to who was responsible for the damage to this cargo, or any portion of it?

A. Yes.

Q. State what he said with reference to the responsibility for the damage to this cargo.

A. Mr. Tucker came down to the vessel at the time the hatches were opened by Captain McIntosh, and the three of us found that the hatches were well closed, according to the certificate that

Captain McIntosh gave me after all the cargo was more or less discharged; he examined the entire ship; after Mr. Tucker had examined the vessel, and had seen the damage done, and read over the protest, he told me that he did not expect to make any claim on the cement because he took it for granted that it was on account of perils of the sea.

Q. Did you have any talk with Mr. Tucker after Mr. Beebe had presented a claim for damage to iron and steel?

A. Yes, and—

Q. State what he said. I will put in another question there. State what he said.

A. Mr. Tucker told me that Mr. Beebe had made a claim on the steel and iron, but that nevertheless he would make no claim because he considered it a case of peril of the sea.

Q. As a matter of fact, when did Mr. Tucker decide to present and assert a claim against the vessel with reference to the time when the cargo was discharged?

A. He libelled the vessel exactly the day—or libelled the ship exactly on the date that the ship would have sailed, and six weeks after the vessel had arrived in port, and on that account the ship was detained three days.

The foregoing testimony is corroborated by that of

J. W. MATTHES (131-133.)

Q. Mr. Matthes, did you have any conversation with Mr. Alfred Tucker in August or September, 1909, with reference to the responsibility for damage to the cargo of the "Babin Chevaye" after the voyage which terminated about that time?

A. Yes, sir, I did.

Q. State what Mr. Tucker had to say on that subject.

A. After the vessel had been in port some time, the cargo was gradually being discharged; it appeared that there was considerable damage, and I believe that when about 800 or more barrels had come out, that proved to be damaged, nevertheless Mr. Tucker intimated that he didn't expect to make claim because, from his investigation on board the vessel, and what was mentioned in the log book, or in the extended protest, to his belief it was simply a case of perils of the sea, where the receivers of the cargo have no claim on the vessel. But some days afterwards, he told me that the Northwest Steel Company had made a claim, quite a large one, on damaged steel and iron, and Mr. Tucker told me that he didn't expect to make a claim on the cement, and he would tell Mr. Beebe that there was no possibility of his making any claim on the vessel. He had no right to.

Q. For what reason?

A. On account of the perils of the sea for which the ship is not responsible. Well, the result was that Beebe & Company considerably reduced the claim, but still insisted on a certain amount, and Mr. Tucker told me that they would press their claim, and wanted me to libel the vessel, because it will be otherwise out of my pocket. They will make the claim to me, and if I cannot recover from the vessel, it will be out of my pocket, or out of the pocket of the firm, and so if they insist upon making a claim, then I am going to include all the damage to the cement likewise.

SAIL ROOM HATCH.

It appears from the testimony that underneath the poop deck, as the vessel was constructed, there was a small hatch leading through the main deck into a compartment which is called the sail room, but in which the stores of the vessel as well as the sails were contained. This hatch was not exposed to the weather in any respect, but was protected by the poop deck of the vessel. The situation is shown clearly by claimants' Exhibit "2." The hatch in question is marked "panneau de la voleurs." It lies forward of the saloon and is on the starboard side of the vessel. This small hatchway was not provided with combings, nor was it customary to keep it battened down with tarpaulins. The construction of the vessel in this respect is attacked by proctors for appellants and it is contended that the damage, or a portion of it, was due to an error in the construction of the vessel in this respect. Judge Bean passed on this matter in his opinion, in the following language (*Record 17*):

"It was claimed at the argument, although not stated in the libel that the vessel was unseaworthy at the inception of her voyage because of an opening into the sailroom and storeroom. This opening was used many times a day and it could not have been battened down without great inconvenience to the officers and crew of the vessel, and without seriously interfering with their work in navigating her. It was protected by the poop deck which was a water-tight deck almost as strong as the main deck and much less exposed to the water. Furthermore there was no evidence that the construction of the vessel was faulty in this respect

and I do not think the court should so find without any evidence to that effect."

The evidence abundantly sustains the conclusions of the lower court in every respect. While several expert witnesses were called by libellants, not one of them was asked the question as to whether this construction was open to criticism. Libellants are asking this court to find that the construction was faulty in the respect indicated without any evidence on which to base such a conclusion. The fact is that the hatchway was not exposed to the weather, but was protected by the poop deck of the vessel. Mr. Garnuchot testifies that the construction of the vessel was in all respects in accord with the rules of the Bureau Veritas and these rules are offered in evidence, being Exhibit "D," attached to the Garnuchot deposition. The specifications for the construction of the poop deck are found on pages 60 to 64 of this exhibit. These specifications abundantly sustain the conclusion of the lower court to the effect that the poop deck was a water tight deck, almost as strong as the main deck and much less exposed to the water. The testimony shows without contradiction that it was not possible to keep the hatchway in question battened down. It was used many times a day by the officers and crew and of necessity must have been so used. The provisions of the vessel and the sails could be reached only through this hatchway. As the sails were changed from time to time and as repairs were to be made upon them and as provisions were required by the officers and crew, it became necessary to use this hatchway. Clearly the con-

struction of the vessel was wise in providing a store-room for sails and provisions beneath the main deck of the vessel. Had the provisions been lost the crew must have perished. Had the sails been carried over-board the navigation of the vessel would have become impossible. Both sails and provisions were therefore properly placed beneath the main deck of the vessel. In view of the frequency with which sails and provisions were required it was impracticable to keep this hatchway battened down. The foregoing facts clearly appear by the uncontradicted testimony.

Furthermore the question of the propriety of the construction of the vessel in the respect indicated is a purely academic question, as the damage in question would have occurred even though the vessel had been constructed with a water-tight hatch at the place in question. It appears from the testimony that one of the sailors was down in the sail room at the time when the great wave overwhelmed the vessel on the 6th of May. The lower force topsail had spread and its stays had torn loose. It became necessary to secure material with which to repair this damage and a sailor was present in the sail room at the time in question for that purpose. The hatch was for this reason open, and unavoidably so, at the time when the wave hit the vessel.

The foregoing facts clearly appear from the testimony of

CAPTAIN LEBEAUPIN (72-73, 111-112).

Q. Will you point out on Claimant's Exhibit 2 how the water went down from the chart room

into the sail room, and from the sail room into the cargo?

A. The water came over here, over the poop deck, stove in the door of the chart room and the wall, went down the staircase, and there was one foot here; in the aft quarters was one foot of water. The water went down the little hatch in the sail room, and got into the between decks, and it has dispersed itself over the entire between decks, over the steel, because in between decks, there is a large plate of iron to reinforce the vessel, and the water has followed this plate further than half the vessel—the middle of the vessel.

Q. State what the hatch leading down into the sail room and the store room is used for?

A. Nearly every moment we have to go there—either for provisions or for sails, or for material to make repairs, and at the same time that this water came down the hatch—came down the staircase—one man had just opened this little hatch and was down there to get something to repair the sails that had been torn.

Q. Is it possible, in the practical navigation of such a vessel as the “Babin Chevaye,” to keep that particular hatch battened down?”

A. No, we couldn't do that, because we have to pass through it too often, and it is very seldom that any water would go down there except in case of an accident.

(111-112.)

Q. Was that entire watch on deck?

A. Another man was just down in the sail room to get additional sail.

Q. What was he going to do with them?

A. He went down there to get material to fix

the sails that had torn loose, so as to attach them again to the stays.

Q. Just doing general repair work, was he?

A. At the time he was not making any repairs. He had gone down stairs to get—

Q. I understand that. What I mean is this: Was he fixing up some sails for emergency, or was he just going to do general repair work?

A. No, it was an emergency, because he had to fix the lower fore topsail. Otherwise, if it hadn't been fixed, it would have carried away.

Q. That is the lower fore topsail that was already spread?

A. Yes, yes, but the stays of the sail had torn loose somewhat.

Q. Was he going aloft to do it?

A. No. I said that he was in the sail room to get the necessary material to fix it.

Q. Then was he going aloft to fix it?

A. Yes, after we had saved the injured, about one or two hours later.

Q. But this was before the accident happened, as I understand it, that he went down for the material, before the wave came over.

A. Yes, but the man was in the sail room just when the wave came on board.

Q. Exactly. Now then, without any regard to the wave coming on board—I don't care about that—had he gone down to get the material, and if the wave hadn't come aboard, was he going to go back and go aloft, and fix the sail?

A. Yes, certainly. He had been ordered to do that.

EXTENT OF CANVAS CARRIED.

Libellants contend that the weather on this voyage cannot have been so severe as contended by claimants, because of the fact that the "Babin Chevaye" carried four sails when the weather was at its worst. It appears from appellants' own testimony that there is great difference of opinion among navigators as to the amount of sail which a vessel should carry and that the master of the vessel, who observes his ship and her method of navigation, knows better than any one else what canvas to carry (*Crowe* 154-155). Captain Lebeaupin testifies that at the time when he is criticised as carrying too much canvas in severe weather, the ship was running with the wind and that the strain on the vessel when running with the wind is less in proportion to the speed of the vessel. We quote his testimony (*Record* 204-206) :

Q. Now state why you carried the sail which was indicated in your answers on the 6th and 12th of May, 1909. Take the 6th of May first.

A. On the 6th of May, I was sailing before the wind, with the wind. It was the only chance I had to keep the vessel going, and for the safety. The principal effects I had to observe was to keep the vessel in the proper direction; was full wind from behind, and without paying any attention to the course and to go faster than the sea, in order the sea would not ship on board. At that time I was going 10 1-2 knots, which I consider reasonable speed under the circumstances, and of the four sails I carried, two were forward of the two others, so the wind blew on the two ones aft, and protected the two forward ones.

Q. Suppose the vessel is running with the wind, or substantially with the wind, at the rate of 10 1-2 knots per hour, and the wind is blowing 21 knots an hour; what effect does the speed of the vessel have in moderating the strength of the waves and the sea on the vessel?

A. The strength of the wind would be the difference between the wind and the speed of the vessel.

Q. Why did you carry this quantity of sail on the 12th of May?

A. I never saw the sails reduced more than this on vessels of similar tonnage. Never during the ten years that I have navigated, I saw lesser sail, and probably if I had tried to furl the other two forward sails, they would have torn to pieces, and injured the other sails; then all the sails would have gone. One is not always sure what maneuvers might be made.

SEAWORTHINESS OF VESSEL.

The strength and fitness of the "Babin Chevaye" for the voyage in question is attested by several circumstances which appear by the record. On her return voyage from Portland, in the Fall of 1909, the "Babin Chevaye" carried a cargo of wheat, which reached Europe in "splendid condition." Her next voyage was from Europe to Portland, Oregon, with a cargo of cement consigned to these same libellants. This cargo was delivered in good condition. At the end of that voyage another cargo of wheat was taken to Europe, which was also delivered in good condition (*Lebeaupin* 87).

The fact that the vessel passed her examination in

the Bureau Veritas is shown by the testimony of local witnesses to be a circumstance of much importance on the question of the condition of the vessel. Captain Albert Crowe, as a witness for libellants, testifies on page 158, as follows:

I think there is no doubt that a vessel, before she gets a certificate from the Bureau Veritas, must be built according to certain regulations for her. While that is in effect, that is evidence the vessel must be in pretty good condition although there may be defects in various places that the certificate really would not bring out at that time. If there were a certificate given just immediately prior to her going to sea, that all those conditions were right, then I think we would have to assume she was right then.

Captain L. Veysey, also a witness for libellants, testifies on cross examination (*Record* 200) :

Q. Do you attach any importance to the fact that the vessel is classed by the Bureau Veritas?

A. Yes, a society for the classification of ships, and is considered by the underwriters to be good.

Q. It stands right in line with Lloyd's does it not?

A. Yes.

Q. In its standing throughout the world?

A. Yes, we accept their surveys on some occasions and they accept ours.

Both Captain Crow and Captain Veysey testify that the severity of the weather encountered by this vessel is sufficient to explain the damage to the cargo and that the damage to the cargo under the circum-

stances of this case does not indicate that the vessel was unseaworthy (*Crowe* 158-159), (*Veysey* 200).

LAW OF THE CASE.

The charter party in this case granted to the charterer the full capacity of the defendant ship. Under this state of facts the claimant is not a common carrier, but is a bailee to transport as a private carrier for hire.

The Fri, 154 Federal 333.

The Royal Sceptre, 187 Federal 224, 226.

Hutchinson on Carriers, 2d Edition, Sec. 73;
3d Edition, Sec. 85.

A libellant suing for damage to cargo must recover, if at all, on the ground alleged in the libel. For example, if he pleads that the damage was due to bad stowage he cannot prove that the vessel was unseaworthy in other respects.

Tweedie Trading Co. v. Sangstad,
180 Federal 691.

In the case at bar the allegations of the libel are that the damage to the cargo was due to bad stowage and leaky decks. (See record, pp. 2 and 3.)

It is true that there appears with the record an amended libel, found on pages 11 to 14. There is no order of the lower court permitting counsel to file this amended libel and the only reference to the filing of the same is found on page 207 of the record. It appears therefrom that at the conclusion of the testimony counsel for libellants said:

"I will ask leave, if I deem it necessary to amend the libel to accord with the proof so as to allege that one of the allegations of unseaworthiness is this hatch in the store room which was open, through which this large wave went. The proof is in, and I may conclude to amend."

The answer of the Court was "Very well."

This was merely a consent by the court to the making of the application. No order was ever taken and the amended libel we are confident is not a part of the record.

It is apparent from the opinion of the lower court, found on page 17 of the record, that the lower court did not consider that this amended libel was a part of the record. Note the following sentence in the opinion of Judge Bean:

"It was claimed at the argument, although not stated in the libel that the vessel was unseaworthy at the inception of her voyage because of an opening into the sailroom and storeroom."

This allegation is found in the amended libel, though not in the original libel. The lower court therefore could not have considered the amended libel a part of the record.

The amended libel differs from the original libel in only two substantial respects. In the original libel the damages were alleged at \$6134.00. In the amended libel they are placed at \$1500.00. The amended libel contains an allegation that the decks of the "Babin Chevaye,"

"were not in a tight, seaworthy, and proper condition at the time she entered upon said voy-

age and her small hatch into the storeroom or sailroom through the main deck was so constructed that it could not be closed at all or made watertight."

The original libel charged that the decks were not tight and seaworthy, but alleged nothing specifically with reference to the hatch in question.

While we have discussed the contentions of libellants with reference to the hatch opening into the sailroom, we contend that the question is not in the case and that libellants must recover, if at all, on the grounds that the decks were leaky when the vessel started, or that the cargo was improperly stowed. The latter contention seems to be abandoned by libellants and the case therefore seems to settle down to one question of fact—was the "*Babin Chevaye*" seaworthy as regards the condition of her main deck when she left Antwerp on the 16th of February, 1909? It is contended by libellants that her main deck was leaky and this contention is disputed by claimant. We have heretofore discussed the testimony on this subject; the lower court found in accordance with our contention. In the opinion of the lower court, found on page 16 of the record, we find this language:

"The vessel was seaworthy in her hull when she sailed. The testimony of Baines and Garnuchot, two experts of long experience, shows that she was thoroughly inspected, afloat and in dry-dock, her decks, seams and calking examined and found in good condition, and in their judgment she was in every way staunch, tight, strong and

seaworthy for the voyage, and their evidence is entitled to respect.”

The question raised by this appeal is a question of fact. This court is asked to reverse the decree of the lower court based on conclusions of fact rendered after hearing the testimony. All of the witnesses for libellants testified in open court, as did several of the witnesses for claimant. The most important witness for claimant was J. Lebeaupin, who was master of the “Babin Chevaye” at the time when she made the voyage in question. Captain Lebeaupin was present at the trial and the court heard his testimony.

The Alijandro, 56 Fed. 621, 624.

“The rule is well settled that in cases on appeal in admiralty, when the questions of fact are dependent upon conflicting evidence, the decision of the district judge, who had the opportunity of seeing the witnesses and judging their appearance, manner, and credibility, will not be reversed unless it clearly appears that the decision is against the evidence.”

Whitney v. Olsen, 108 Fed. 292.

Jacobsen v. Lewis Klondike Co., 112 Fed. 73.

Paaauhau Co. v. Pala Pala, 127 Fed. 920, 924.

Perriam v. Pacific Coast Co., 133 Fed. 140, 144.

Reed v. Weule, 176 Fed. 660.

Spencer v. The Dalles Co., 188 Fed. 865.

All of the foregoing are decisions of this court and they all support the principle announced in the first case above cited. We are therefore entitled to ask an affirmance of this cause, unless the court can say that

there was no evidence in the record to support the decree as passed by the lower court, or unless this court can say that the preponderance of the testimony was overwhelmingly and clearly against us. The testimony which we have quoted and discussed at an earlier point in this brief certainly precludes any such conclusion.

There are many authorities defining seaworthiness in a vessel. The following cases will be found to state and apply the rule clearly and in accordance with the weight of authority.

The Orient, 16 Federal 916, 917.

“Seaworthy, in the sense used, means in such a condition of strength and soundness as to resist the ordinary action of the sea, wind, and waves during the contemplated voyage. A ship is seaworthy in this sense when her hull, tackle, apparel, and furniture are in such a condition of soundness and strength as to withstand the ordinary action of the sea and weather.”

“In this case of the *Orient* it is established beyond controversy that the *Orient* was sound and seaworthy for more than two years preceding, and that she was wrecked in a cyclone or storm of terrific force. The burden of proof is, therefore, upon the insurers to establish satisfactorily the alleged unseaworthiness of the *Orient* at the times alleged.”

The Titania, 19 Federal 101, 107.

This was a case in which merchandise in the cargo of a ship was damaged because a propeller carried with the merchandise broke loose and jammed the goods in the same compartment with the propeller. The ques-

tion was, whether the damage was due to the perils of the sea or to unseaworthiness of the vessel because of imperfect stowage. The District Court for the Southern District of New York, speaking through Judge Brown, said:

“The question of seaworthiness, therefore, as regards the implied warranty in favor of the insurer or of the shipper of goods, is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If judged by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is legally attributable to the ship or her owners. Where actual defects, though latent, are established by the proofs, that is, such defects as at the time when the vessel sailed would, if known, have been considered as rendering the vessel unseaworthy for the voyage, such as rotten timbers, defective machinery, leaks, etc., such defects, though latent, are covered by the implied warranty of seaworthiness, and are at the risk of the ship and her owners, and the policy does not attach. 2 Arn. Ins. c. 4; 1 Pars. Mar. Ins. 369; Abb. Ship. 340; 3 Kent, *205; Lee v. Beach, 1 Park. Ins. 468; Quebec Marine, etc., v. Commercial, etc., L. R. 3 P. C. 234; Work v. Leathers, 97 U. S. 379; The Vesta, 6 Fed. Rep. 532; Hubert v. Recknagel, 13 Fed. Rep. 912. But this principle cannot be applied to cases where, all the circumstances being known, the vessel would still be deemed by competent persons, and according to existing

knowledge and usages, entirely seaworthy, and reasonably fit for the voyage, although subsequent experience might recommend additional precautions. It was long ago held, (*Ames. vs. Stevens*, 1 *Strange*, 128,) and is laid down in *Abb. Ship.* 389, as elementary law, that "if a vessel reasonably fit for the voyage be lost by a peril of the sea, the merchant cannot charge the owners by showing that a stouter ship would have outlived the peril." This principle applies equally to the stowage of the cargo.

The same result is derived from a consideration of the question as a matter of stowage only, not affecting the seaworthiness of the ship. For it is well settled that in determining what is proper stowage, the customs and usages of the place of shipment are to be considered, and if these customs are followed, and if none of the known and usual precautions for safe stowage are omitted, no breach of duty, or negligence, can be imputed to the ship; and in case of damage under great stress of weather, the injuries will be ascribed to perils of the seas, and held to be chargeable upon the insurers."

"In the present case no fault is found with the place or general method of stowing and securing this spare propeller. The general plan of securing it was approved by the libellant's witnesses; and the expert upon whose testimony the libellant chiefly relies as to the unseaworthiness of the ship, suggested for her return voyage, after this accident, no change in the place or general method of securing the spare propeller, but only the addition of a few more rivets, a heavier chain, and the fastening of the chocks to the deck. These are obviously

matters of detail necessarily depending upon the judgment of persons in charge of such work.

“From the large mass of evidence on this subject put in by the claimants, it seems to me impossible to hold that this propeller was not stowed and secured in a manner believed and judged, by persons having the largest experience and who were most competent in such matters, to be sufficient and safe in all respects. The ship was built, and this propeller was stowed and fastened, under the inspection of one of the Lloyd’s surveyors, who testified that it was well and properly done, and was approved by him as the representative of the underwriters. And even in view of the accident which afterwards happened, he still gives it as his opinion that it was well and sufficiently secured, and that something extraordinary must have happened to account for its breaking loose.”

When a *prima facie* case as to seaworthiness has been made out by the vessel, and when the evidence shows an adequate cause for the damage in extraordinary stress of weather conditions on the voyage, the burden of proof shifts and it then devolves on the libellant to show that the damage was due to some other cause than by the perils of sea or dangers of navigation so proved by claimant.

The Marlborough, 47 Federal 667, 670.

“What constitutes seaworthiness is not, I think, open to controversy. The vessel must be reasonably safe for the service and voyage undertaken. There are, however, degrees of safety; and she need not be the safest. A new vessel, of the highest order of construction, is safer than one several years old, and of a lower order of workmanship. Yet

the latter may be, and, if in good condition, is, seaworthy. A majority of vessels in the merchant service, employed on the most dangerous voyages, are of the latter description."

"The specifications on which the charge of unseaworthiness rests are, substantially, that the decks were worn out; that she was overloaded; that she was not sufficiently provided with coal; and that the decks should have been renewed at Bombay, if not before starting. The decks seem to have been in good condition when she left Iloilo. Notwithstanding the rough weather encountered for several days on the passage (covering nearly 3,000 miles) to Colombo, which drove the water over her, there was no leakage; and after the leaks were recaulked at Ceylon, where the work could be well done, she crossed the Mediterranean and the Atlantic,—a distance of more than 3,000 miles,—with a good deal of rough weather, in safety. I do not attach serious importance to the fact that the decks had needed repair a year or more before the vessel started. They had been repaired, and subsequently. Nor do I attach serious importance to the fact that they opened and leaked after the vessel passed Colombo, and had been subjected for many days to the severe weather of the monsoon. Whether decks be new or old, the pitching and twisting and pounding of the vessel in such weather will be likely to cause leakage. Such a result cannot, therefore, under such circumstances, be accounted evidence of unseaworthiness, even when the tempestuous weather is anticipated at starting. Some damage to cargo, under these circumstances, is probable, if not unavoidable. It is not clear, however, that any damage was sustained from leakage until after

the hurricane or cyclone was encountered, beyond Point De Calle. The weather through which the vessel then passed is amply sufficient to account for the crippled condition in which she reached Bombay, without the aid of any inference of unseaworthiness at starting. But for this storm, I find nothing to justify belief that she would not have continued her course, and reached Aden safely, with little or no loss to cargo. In that case the question of seaworthiness could not have arisen, and what is now said of her decks, overloading, insufficiency of fuel, would not have been thought of. It is inspired by the desire to find some other cause of disaster than the storm,—a sufficient, the most obvious, cause,—and thus to charge the vessel with loss, which otherwise the libellant must bear.”

Mosle v. The Sintram, 64 Fed. 884, 885.

“Though the owner formerly warranted the absolute seaworthiness of the vessel (*The Edwin I. Morrison*, 153 U. S. 210, 14 Sup. Ct. 823), this absolute warranty of seaworthiness does not mean a warranty that neither ship or cargo shall suffer damage on the voyage; nor exclude sea perils, and the damage that may arise therefrom. It means only that the ship is in all respects reasonably fit for the voyage, i. e. “competent to resist all ordinary action of the sea” * * * * *

“The evidence shows all reasonable and customary care and diligence to make the ship sufficient, so far as human foresight could perceive before sailing; that the regulations in that regard at Hong Kong are among the most stringent; and that the surveyors of the insurers of cargo inspected the vessel and suggested nothing further to be done; and that she rated in the highest class. * * * *

Leaks soon happening in ordinary weather are presumptive evidence of unseaworthiness at the time of sailing. *Cort v. Insurance Co.*, 2 Wash. C. C. 375, Fed. Cas. No. 3,257; *Higgie v. American Lloyds*, 14 Fed. 143; *The Gulnare*, 42 Fed. 861; *Hewlett v. The Hillie R. Bohannon*, 64 Fed. 883. But where the evidence shows that reasonable care had been exercised to make those seams tight, and that the ship is in other respects tight and staunch, and shows general efforts to make her in all respects seaworthy, comparatively small damage arising from some leaks in the water ways first appearing after continued heavy seas and rolling, and shipping water, is insufficient to overcome general evidence of seaworthiness at the commencement of the voyage, and is ascribed to sea perils; because a specific and adequate cause is shown consistent with seaworthiness at the beginning of the voyage."

Affirmed 79 Fed. 1002.

Ceballos et al. v. The Warren Adams, et al.,
74 Fed. 413, 414, 415.

"When goods in the custody of a common carrier are damaged after their reception, and before their delivery, there is a *prima facie* presumption that the injury is occasioned by the carrier's default, and the burden is upon him to prove that it arose from a cause for which he was not responsible. If it appears that the injury has been caused by the dangers of navigation, or some other cause within the exception of the bill of lading, then it devolves upon the shipper to make out that the damage might have been avoided by the exercise of reasonable care and skill upon the part of the carrier. No loss which is the result of ordinary wear and tear, or a necessary consequence of the

employment of the vessel in the usual course of navigation, is a loss by 'perils of the seas.' That term may be defined as denoting 'all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence, upon the fabric of the vessel; casualties which may, and not consequences which must, occur.' * * * * *

"The vessel had been tried by violent seas for 36 hours before she sprang a leak, and the sufficiency of her centerboard trunk had been repeatedly demonstrated. It is not surprising that the oakum should have worked out of some of the seams, in the violent straining to which the trunk must have been subjected on the several occasions when she tacked. Where a vessel, soon after leaving port, becomes leaky, without stress of weather, or other adequate cause of injury, the presumption is that she was unsound before setting sail. The law will intend the want of seaworthiness because no visible or rational cause, other than a latent or inherent defect in the vessel, can be assigned for the result. But, where it satisfactorily appears that the vessel encountered marine perils which might well disable a staunch and well-manned ship, no such presumption can be invoked. And where, for a considerable time, she has encountered such perils, and shown herself staunch and strong, any such presumption is not only overthrown, but the fact of her previous seaworthiness is persuasively indicated. *Patrick v. Hallett*, 3 Johns. Cas. 76; *Potter v. Insurance Co.*, 2 Sumn. 197, Fed Cas. No. 11,339; *Walsh v. Insurance Co.*, 32 N. Y. 427; *Wilson v. Jones*, L. R. 2 Exch. 143. Besides the presumption afforded by the circumstances referred

to, the examination of the shipwright, made just previous to the commencement of the voyage, is evidence which ought not to be ignored. Although he did not make an examination of all the seams in the centerboard trunk, it is reasonable to assume that those he did examine were in such condition as to justify an experienced man in believing that a more critical inspection was not necessary."

The Tjomo, 115 Fed. 919, 921, 922.

"The evidence on the part of the claimant shows the encountering by the ship of a terrific storm of wind and heavy seas, characterized by the master of the ship as 'a very heavy hurricane,' with wind from 90 to 100 miles an hour. The first mate, who had been going to sea 10 1-2 years, speaks of it as 'the most terrible storm' he ever saw. The second mate has been going to sea 10 years, and says he 'never saw such a big storm before.' This evidence shows a specific and adequate cause for the loss of the cattle, consistent with the seaworthiness of the ship, and warrants the conclusion that this was the immediate cause of the loss. This, then, puts the burden on libellant to show that the result would have been prevented by the exercise of due care and dilligence in the construction of the fittings of the vessel and in the proper stowage of the cattle. My opinion is that, notwithstanding the stipulations in the bill of lading, the owner of the ship should have exercised due diligence to properly equip and outfit the vessel, and to make her seaworthy, and capable of performing her intended voyage, and the obligations of the master, agents, or servants to properly stow the cattle were not thereby lessened or avoided. Harter Act, Feb. 13, 1893. The Manitoba (B. C.) 104 Fed. 145. Where it satis-

factorily appears that the vessel encountered marine perils which might well disable a staunch and well-manned ship, where it appears that the loss has been caused by the dangers of navigation, it devolves upon the shipper to make out that the damage might have been avoided by the exercise of reasonable care and skill upon the part of the carrier."

On the question of whether a vessel is seaworthy the authorities lay great stress on the fact that the vessel passed inspection with an Insurance Company at the inception of the voyage, provided it be shown that such inspection was a thorough inspection.

The Marechal Suchet, 112 Fed. 440, 441.

"The burden of proof that the vessel was seaworthy, and that the damage sustained by her cargo was occasioned by perils of the sea, is upon the carrier. Seaworthiness is a question of fact, and upon consideration of the evidence my conclusion is that the *Marechal Suchet* was seaworthy at the commencement of the voyage; or, in other words, 'that she was in a condition reasonably fit to encounter whatever perils of the sea a ship of that kind, and laden in the way in which she was, would fairly be expected to encounter during the voyage upon which she sailed,' and this was all that was required to render her seaworthy. Hughes, Adm. p. 57. The facts which lead to this conclusion are that just prior to the commencement of the voyage the vessel carried a cargo of wheat from Portland, Or., to Limerick, Ireland, and delivered the same in good condition; that her decks were inspected by competent persons at Liverpool before loading for the voyage to San Francisco, and, in the judg-

ment of those making the examination, were in a fit condition for that voyage. If the decks were then unseaworthy, and required calking, it does not seem probable that such fact would not have been ascertained at that time. The evidence shows that in rounding Cape Horn the vessel met with almost continuous gales and high seas for about three weeks, which caused her to labor heavily, and kept her decks flooded much of the time. This condition of weather cannot be said to have been such as vessels ordinarily meet with on such a voyage, and sufficiently accounts for the opening of the seams in her deck, and the leakage of sea water, which caused the damage complained of. Without, however, attempting to state all of the evidence bearing upon the question, it is sufficient to say that in my judgment it shows that the *Marechal Suchet* was seaworthy at the commencement of the voyage, and the damage sustained by her cargo was occasioned by perils of the sea, within the rule declared in the cases of *The British King* (D. C.) 89 Fed. 872; *The Sintram* (D. C.) 64 Fed. 884; *The Warren Adams*, 20 C. C. A. 486, 74 Fed. 413; *The Mauna Loa* (D. C.) 76 Fed. 829-836; and *The Titania* (D. C.) 19 Fed. 101-105."

Cook v. Southeastern Lime & Cement Co.,

146 Fed. 101, 102.

"The schooner sailed from New York November 30, 1905, with a cargo of 1,000 barrels and 24,000 sacks of cement, arriving in Charleston, December 6th. When the cargo was unloaded, it was found that 606 barrels and 1,455 sacks had been damaged by water, requiring rehandling and sifting, and the net loss proved is 116 barrels and 319 sacks.

"As it is the primary obligation of the carrier

to carry with reasonable care, such an unusual damage as is proved in this case raises a presumption of fault and puts upon the ship the burden of proving that the loss falls within some of the exceptions of the bill of lading. The only exception in the body of the bill of lading is the 'dangers of the sea.' Further exception is stamped on it by a rubber stamp as follows: 'Vessels not accountable for leakage, breakage or calking,' and, as the libellants claim that the damage was due to the 'dangers of the seas,' it is for them to show a sea peril adequate to cause such loss in a seaworthy ship. The testimony shows that the 'Mary B. Baird' was a schooner about 15 years old; that during the fortnight preceding the taking on of this cargo, she was in the dry dock in New York for recalking and repairs, and was there examined by an inspector of the Atlantic Insurance Company, who made a careful inspection in behalf of that company, which insured the cargo. This inspector testifies that the ship was in good seaworthy condition."

"There is no testimony which contradicts or impeaches that of the inspector who examined the ship in New York, and I am bound therefore to hold that the ship was seaworthy when she sailed."

"The master, the mate, and a seaman were examined for the libellants. They testify that they encountered a strong gale from the northwest when they came out of New York, but after that there was no storm, but all of them say that they had very rough weather all the way down, heavy seas washing across the deck all the time, and the vessel laboring heavily. The mate and seaman both testify that it was the roughest passage they had ever had in southern waters. The question for decision,

therefore, is whether the rough weather described was one of the ordinary incidents of a sea voyage, or whether it is to be considered one of the 'dangers of the sea,' within the exception of the bill of lading. 'Perils of the sea' are the exceptions in almost all marine undertakings, and the phrase has been defined in innumerable cases. Sometimes it is construed as equivalent to an act of God, but it has grown to have a wider signification, and the expression is generally construed to denote those accidents at sea peculiar to navigation arising from irresistible forces or overwhelming power which do not happen by the intervention of man, and cannot be guarded against by the ordinary exertions of human skill and prudence. Any loss which might have been avoided by the exercise of reasonable skill or diligence, at the time when it occurred, is not deemed such a loss by the perils of the sea as will exempt the carrier from liability; but a loss from the effect of storms and tempests and straining the ship or causing her to leak, whereby damage is done to the goods, may be well attributed to the perils of the sea, although in one sense they may be ordinary accidents. It is well known, and has been proved in this case, that all wooden vessels will leak a little. That does not render them unseaworthy, and wherever it is proved, as it has been here, that a vessel was seaworthy at the inception of her voyage, that her hatches were well secured, that her cargo was well stowed, that her pumps were efficient and properly worked, that she encountered heavy seas which washed across her deck, that she labored heavily, that the rolling caused by such heavy seas was calculated to strain her seams and cause her to take in water, and that such rolling

prevented the pumps from discharging the water, I must conclude, upon the authority of the decided cases, that the damage must be attributed to 'dangers of the sea,' for which the ship was not liable under the exception of the bill of lading."

The Guadeloupe, 92 Fed. 670.

"On the 31st day of March, 1898, the French schooner *La Guadeloupe*, being then at Santos, Brazil, was chartered to E. Johnston & Co., for the carriage of a cargo of coffee to New York. She was loaded by the charterers and left Santos on May 4, 1898. Shortly after, she met with a pampero, or hurricane, in which she lost her anchors, damaged her windlass, and was subjected to considerable strain, whereupon she returned to Santos for repairs. After an official survey there, and the making of all such repairs as were deemed necessary, she again sailed on the 31st day of May, and arrived in New York on the 13th of August. Upon discharging, considerable of the coffee was found damaged by sea water, to recover which damage the above libel was filed.

"1. The libel charges unseaworthiness on sailing from Santos, and bad stowage. The evidence shows that two beams of the main hatch had been cracked at some time previous to this voyage, and that under the direction of the Bureau Veritas repairs had been made and the beams strengthened by nailing slabs or planks across the cracks in or prior to December, 1896. Her classification had kept up on repeated surveys, and had not expired at the time this voyage was made. I am of opinion that the evidence offered is sufficient to afford presumptive evidence of seaworthiness at the time the vessel first sailed from Santos, and that the extraordinary

weather she soon after experienced, together with her subsequent voyage, is sufficient to account for the widening and increase of the cracks in the beams, and for the sinking of the deck, as they were found to exist after her discharge in New York."

"It was doubtless the duty of the master to use diligence in making all necessary repairs at Santos to put the ship in a seaworthy condition, and for that purpose to make such surveys as were apparently needed in order to determine what repairs were necessary. This obligation, however, was not a warranty, but a duty to use due diligence only. An official survey as I have said was made, and everything was done by the master that was recommended."

"If any error was committed in this respect, I think it was an error of judgment. It was an error, moreover, pertaining to the 'management' of the ship; since the question arose after the voyage had commenced, at a port of distress, far from the home port, and away from any supervision by the owners, and was wholly subject to the master's determination.

"In procuring the survey and doing the repairs, as the master acted with due and reasonable care and diligence, the case falls within the express provision of Section 3 of the Harter Act (2 Supp. Rev. St. p. 81)."

Emphasis is also laid on the inspection for insurance purposes as tending to prove that the vessel was seaworthy in a decision rendered in the Washington Court.

The Jane Gray, 99 Fed. 582.

This is a decision rendered by Judge Hanford.

The vessel in question was lost in the Pacific Ocean west of Vancouver Island, and one of the questions mooted in the litigation was whether the Harter Act was a defense. On page 586 of the report, Judge Hanford emphasizes the inference that the vessel was staunch, strong, and seaworthy arising from the fact that she had made long voyages and done good service and from the kindred fact that she had been inspected immediately prior to the voyage and found to be in good condition.

The case strongly supports the contention of claimant in the case at bar on the subject of stowage. Judge Hanford's decision rebuts the contention that a ship owner can be held to a hard and fast rule with reference to the amount of cargo to be carried in one part of the vessel or another part thereof and can be deprived of the benefits of the Harter Act because of some departure from such rule. The fact that a vessel was loaded with so much of her cargo on deck and in the between decks as to make her roll easily did not prove that she was badly stowed and that her owners were responsible for damage to cargo. The Harter Act was held to be a defense as against claims arising from the loss of the cargo.

The above case does not stand alone in holding that the rule for the distribution of cargo is not a hard and fast rule.

The Whitleburn, 89 Federal 526.

This case holds that the proper amount of ballast to be carried cannot be determined by a general observation of a ship's measurements and cargo spaces.

In other words, every ship is to some extent a law unto herself on the subject of stowage, and general expert testimony is much less convincing than the testimony of those who are familiar with the ship and have studied her lines and the weight of her superstructures.

APPELLANTS' CASES.

We are obliged to write this brief without the advantage of seeing appellants' brief. We assume that the line of authority relied on by appellants in this court will be much the same as the authorities cited in the court below. These authorities we think will be found not to be in point. The cases most relied on by appellants in the court below were the following:

The Edwin I. Morrison, 153 U. S. 199.

We find the following language at page 214 in this case:

"If, however, the vessel had been so inspected as to establish her seaworthiness when she entered upon her voyage then upon the presumption that that seaworthiness continued the conclusion reached might follow, but we are of opinion that precisely here respondents failed in their case."

In the case at bar, on the contrary, we have shown by the evidence of three witnesses, all men of experience and qualified to advise the Court correctly, that the vessel was tight, staunch and strong when she left Antwerp. We submit that no case could be clearer in its proof of the thorough inspection of the vessel and of her seaworthiness in all respects than this case is under the evidence of the witnesses Garnuchot, Baines

and Lebeaupin, corroborated as to stowage by the testimony of the witness Meeuwissen.

The Palmas, 108 Federal 87.

This case holds that a ship must expect the weather ordinarily encountered at a given time of the year on the voyage taken. We do not dispute this principle of law, but the evidence in this case, we contend, takes this case out of the application of this rule. The Court will remember the testimony of the witnesses Lebeaupin, Rehel and Grennapin, all navigators of many years experience, who testified that they never saw such weather before or since.

The Compta, F. C. 3069, 4 Sawyer 375.

There was evidence in this case that the deck of the vessel had been repaired with old and decayed timber and that the calking had been unskilfully and inefficiently performed. The testimony showed that the oakum hung down from the deck, having been driven through the seams, and that a knife could be inserted into the seams and passed from beam to beam without encountering any calking whatever. This testimony justified a finding that the vessel was unseaworthy. The principle of law announced by this case is found on page 231 of the report in West's Federal Cases, and we believe it correctly states the law. It is as follows:

“The carrier, to make good his defense, is bound to show that the damage arose from a sea peril. It is not enough for him to show that it might have arisen from that cause. He must prove that it did.

This proof can be afforded either by showing a sea peril of such a character that injury to the vessel, however staunch and seaworthy, would be its natural and necessary consequence; or, by the direct testimony of those who observed its effect upon the ship; or, by proving her condition on her arrival; or, he may exclude every other hypothesis of causation, by satisfactory proof that she was tight, staunch and seaworthy at the commencement of the voyage.”

The Thames, 61 Federal 1014.

The testimony in this case showed that the deck was defectively constructed. Its construction was in violation of Lloyds' rules. The deck sagged and worked out the calking. The testimony further showed that the stowage was faulty, and that large quantities of flour and oil were carried in the same portion of the vessel. Expert testimony showed that this stowage was improper and likely to result in injury to the cargo.

Neilson v. Coal, Cement & Supply Co.,
122 Federal 617, 619.

In this case a cargo of cement had been carried from New York to Wilmington, North Carolina, a short voyage. The preponderance of the evidence satisfied the court that the decks had not been properly calked. There was in fact no direct evidence to the contrary. Distinguishing points between this case and the case at bar will appear from the following quotation from Judge Simonton's opinion:

“It would be enough to excuse the vessel if this seaworthiness existed at the time the voyage had

begun. If, by stress of weather, or other causes in the exception of the bill of lading, her seaworthiness was diminished, the vessel would not be liable. Now, it is clear that when she reached Wilmington the deck of the schooner—her upper deck—was leaking. She was an old vessel, and her calking was found imperfect. Was this the case when she left New York? There is no direct evidence on this point. The only testimony is that generally she was seaworthy. The stress of weather to which she was subjected did not strain her timber, nor open the seams of her hull, or disarrange her hatches. There is nothing to show that the tempestuous voyage opened the seams of her upper deck. It is reasonable to conclude that the condition of things that existed at Wilmington must have existed at her port of loading. The trial judge found this to be the case, and, in the absence of evidence to the contrary, we adopt his view of the matter.”

The C. W. Elphicke, 122 Federal 439.

In this case the testimony satisfied the court that the tarpaulins used over the hatches were old and leaky; that the battens were old, spilt and insufficient to hold the tarpaulins in place. The condition of the cargo indicated that considerable quantities of sea water had leaked through the hatches. It was properly held on this evidence that the ship was unseaworthy at the inception of the voyage.

The Nellie Floyd, 116 Federal 80.

In this case the vessel was 23 years old. There was no inspection of her decks at the inception of the voyage, and she was given no rating for marine insurance. Her decks had not been calked for eight

years or upwards. The evidence showed that they were leaky at the inception of the voyage. In the case at bar the evidence shows that the vessel was but eight years old; that she had been carefully and thoroughly inspected at the inception of her voyage; that she had been given a No. 1 rating in Bureau Veritas, and that her decks were water-tight at the inception of the voyage.

The Mohler, 21 Wallace 230.

This is an old case, decided in 1874, wherein the question was, whether the master of the vessel had been guilty of an error in judgment or a fault of navigation. The court held that he had. But the charter party in the case at bar would relieve the ship from responsibility for such fault as was the foundation of liability in the case above cited by libellants.

The Folmina, 212 U. S. 354.

The Medea, 179 Federal 781, 791.

These cases were determined against the carrier on the ground that the carrier had failed to show how the sea water entered into the vessel and damaged the cargo. They are not in point in the case at bar for the reason that the evidence of claimants abundantly shows how this sea water entered the cargo. We show that this great wave, higher than any that the witnesses had ever seen before, broke in the wall of the chart room on the 6th of May, falling upon the vessel with a tremendous momentum and bringing her as near shipwreck as a vessel can ever be. We show that the vessel, weakened by the impact of this wave, encountered the unprecedented storm of May 12th,

whereby she strained and rolled and lost one of her rivets, this rivet being missing for forty-eight hours, and that the decks were awash during all of this time. We show that these two storms were the climax and culmination of two months and a half, during which the weather was prevailingly bad. We think there can be no escape from the conclusion that the damage done to this cargo was done at this time and in this manner. The evidence shows that there were 4,940 barrels of cement in the cargo (*Record* 294, 295). At \$2.10 per barrel, the price fixed by libellants in their Exhibit "A," this portion of the cargo was worth \$10,374.00. The damage to the cement claimed by libellants is \$894.26, and these figures include an item of \$64.40 for four months storage, which very plainly is an improper item to be allowed libellants, the evidence showing that one month was a sufficient time for the reconditioning of this cargo. The evidence shows, in other words, that the damage to the cement cargo was less than nine per cent of its value and this included expense of reconditioning.

It appears from libellants' Exhibit "A," that only 224 barrels of cement out of 4,940 barrels, were lost. This was less than five per cent of the cement cargo. The ochre, talcum, and Venetian red (*Record* 293-295) were not damaged at all, and on the large cargo of iron and steel which this vessel carried the entire damage claimed by libelants is only \$597.00.

If the decks had been leaky when the vessel left Antwerp the damage must have been far greater than that shown by the testimony in this case. The court

will remember the testimony of Captain Lebeaupin that he could recall only a few days in the two months and a half of bad weather when the decks were not awash with water. The only theory which will square with the testimony is the contention of claimants that the damage to the cargo was occasioned in the storms of May 6th and May 12th. By this we mean the storms which attained their maximum severity on these days. The evidence shows that the weather was extraordinary in its severity for many days about that time.

The testimony shows that no water had been found in the hold until after this severe stress of weather, although the pumps were sounded daily. If the decks had leaked from the time the vessel left Antwerp this condition could not have obtained, especially as the weather was prevailingly bad at all times after April 18th.

The Ninfa, 156 Federal 512.

We have no quarrel with the law as announced by Judge Wolverton in this decision. There was no evidence given by Lloyds' Surveyor who inspected the vessel. The certificate of survey was offered in evidence apparently without any showing as to the kind of survey that had been made or as to the kind of survey which was required to be made. In the case at bar we have the clearest and most convincing evidence from Mr. Garnuchot as to the thoroughness of his examination and as to the results thereof. We concede that the mere fact that an examination was made without evidence as to the character of the man who

made it or as to the kind of examination he made is a weak showing on the subject of seaworthiness. We are unable to see what better showing could be made on this question than has been made by the evidence in the case at bar. Our case is distinguishable from *The Ninfa* on this ground and on many other grounds. Note, for example, the extent of the damage to *The Ninfa's* cargo, and the impossibility of accounting for it except on the assumption of leaky decks.

The Aggi 93 Federal 484.

In this case the damage was caused by leakage in the forepeak, due to loosening of bolts. There had been no inspection of these bolts at the inception of the voyage, and the evidence tended to show that they were loose at that time. The court held that this failure to inspect could not be excused, and that the loose condition of the bolts and the leaky deck as the result of such condition prevented the vessel from being seaworthy. The law of the case is laid down on page 491, and the opinion strongly supports our contention in the case at bar. The following principles are affirmed as supported by the authorities:

"3. General evidence of seaworthiness may be sufficiently strong and satisfactory to show seaworthiness in the detail of construction which is the subject of the action."

"5. Where the loss is fully accounted for by sea perils (that is, where it is proven that sea perils caused the injury), the shipowner may not be called upon to show seaworthiness."

"6. Where there was general proof of seaworthiness at the inception of the voyage, and an

adequate cause is shown for the defect on the voyage, the burden of proving seaworthiness was deemed fulfilled."

"7. The fact that a vessel had been for a sufficient time subjected to conditions calculated to test her seaworthiness in the respect wherein she subsequently showed defect, without any evidence of such defect, and thereafter an adequate cause for the defect was present, is sufficient evidence that the ship was seaworthy at the beginning of her voyage."

Libellants contend that the "*Babin Chevaye*" was unseaworthy at the inception of her voyage because of the opening from her chart room into the sail room and store room of the vessel. On this point the case cited and relied on is

The Indrapura, 178 Federal 591.

In this case there was expert evidence that the construction of the vessel was faulty in that it failed to afford protection to the cargo in the event of the breakage of a pipe connected with the ballast tank. The court's view of the proper way to give such protection differed from that of the expert witness, but the record in the case showed that the protection could be given by a method which was simple and inexpensive, and which would not in any manner have interfered with the navigation of the vessel or the comfort of the officers and crew. All that was necessary, according to Judge Wolverton's view, was to insert a valve or stopcock in the pipe in such a manner as not to interfere with its usefulness but merely to permit

the stopping of the pipe in case the cargo should be flooded.

The distinction is obvious between *The Indrapura* and the case at bar. It was necessary to go down the opening from our chart room to our sail room and store room many times every day. This opening could not have been battened down without great inconvenience to the officers and crew of the *Babin Chevaye*, and without seriously interfering with their work in navigating the vessel. If it had been battened down it would have made no difference on the 6th of May, because it happened that a man had gone down this hatchway to replace a torn sail at the very time when the big wave hit the vessel. If the hatchway had been battened down ordinarily it would have been opened at the time when the water flooded the chart room and officers' quarters.

This hatchway, moreover, was protected by the poop deck of the vessel. This was a water tight deck almost as strong as the main deck of the vessel and much less exposed to the weather. For the construction of the poop deck, see page 60 of the Regulations of the Bureau Veritas, being Exhibit "D," attached to the Garnuchot deposition. The evidence shows that the construction conformed to these requirements, and the evidence shows affirmatively that the poop deck construction was staunch, strong and fit to meet any condition of weather which would ordinarily be encountered.

Libellants called three expert witnesses to testify on other branches of the case. It is significant that these

men were not asked to enlighten the court as to whether the "Babin Chevaye" was properly constructed in this respect. The Court is asked to determine this question without any evidence whatsoever. We submit that it was the duty of the vessel to place her sails and stores at some point below the main deck. Without her sails the vessel would be helpless, and without her stores her crew must perish. Manifestly, both sails and stores were safer below the deck than on the deck. If it be conceded that the sails and stores should be kept at some point below the deck, then manifestly the construction was not faulty in leaving the sails and stores accessible, because the evidence shows that it was necessary to reach them many times a day.

Judge Carver, in his work on "Carriage by Sea," uses the following language in Section 18:

"But the duty to supply a seaworthy ship is not equivalent to a duty to provide one that is *perfect*, and such as cannot break down except under extraordinary peril. What is meant is that she must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it."

Can the Court say, without evidence on which to base its finding, that an ordinary prudent man would have refused to send the "Babin Chevaye" to sea without tarpaulins and battens firmly fastening down this hatchway, when he must have known that the hatchway would have to be opened many times a day in order

to supply the sails needed for navigation and the stores needed for food? We think the Court will find that there is as much lack of authority as of evidence to justify such a conclusion.

SNOW & McCAMANT,
Proctors for Claimants and ~~Appellants~~.

Appellants



United States
Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

TSURU TOMIMATSU,

Appellee.

In the Matter of the Petition of TSURU
TOMIMATSU for a Writ of Habeas Corpus.

Transcript of Record.

Upon Appeal from the United States District Court for the
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Names and Addresses of Attorneys.

For Petitioner, TSURU TOMIMATSU:

GEORGE S. CURRY, Esq., #846 Kaahumanu
Street, Honolulu, Hawaii.

For Respondent, RICHARD L. HALSEY, Esq.,
U. S. Immigration Inspector in Charge at
the Port of Honolulu:

ROBERT W. BRECKONS, Esq., United
States District Attorney, Honolulu, Hawaii.
[1*]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

No. 46.

In the Matter of the Petition of TSURU TOMI-
MATSU, for a Writ of Habeas Corpus.

**Order Extending Time to November 11, 1912, to
Transmit Record on Appeal.**

Now, on this 18th day of October, A. D. 1912, it
appearing from the representations of the clerk of
this court that it is impracticable for said clerk of
this court to prepare and transmit to the clerk of the
Ninth Circuit Court of Appeals, at San Francisco,
California, the transcript of the record on assign-
ment of error in the above-entitled cause, within the
time limited therefor by the citation heretofore is-
sued in this cause, it is ordered that the time within
which the clerk of this court shall prepare and trans-
mit said transcript of the record on assignment of

*Page-number appearing at foot of page of original certified Record.

error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to November 11, 1912.

Honolulu, Hawaii, October 18th, 1912.

CHAS. F. CLEMONS,

Judge United States District Court.

Due service of the above order, and receipt of a copy thereof, are hereby admitted this 18th day of October, A. D. 1912.

THE UNITED STATES OF AMERICA,

Defendant in Error Above Named.

By C. C. BITTING,

Assistant United States District Attorney.

[Endorsed]: #46. In the United States District Court, Territory of Hawaii. In the Matter of the Petition of Tsuru Tomimatsu for a Writ of Habeas Corpus. Order Extending Time to Prepare Record on Appeal. Filed October 18th, 1912, at — o'clock, and — minutes — M. A. E. Murphy, Clerk. By F. L. Davis, Deputy Clerk. [2]

In the District Court of the United States in and for the District and Territory of Hawaii.

No. 46.

In the Matter of the Petition of TSURU TOMIMATSU for a Writ of Habeas Corpus.

Statement.

Time of Commencing Suit:

July 25, 1912: Verified petition for writ of habeas

corpus filed and writ issued to the United States Marshal for the District of Hawaii.

Names of Original Parties:

Petitioner: TSURU TOMIMATSU.

Respondent: RICHARD L. HALSEY, Esq., U. S.

Inspector of Immigration in charge at the Port of Honolulu.

Dates of Filing of the Pleadings:

July 25, 1912: Petition.

July 31, 1912: Return of Richard L. Halsey to Order to Show Cause.

September 18, 1912: Return of Richard L. Halsey to Writ of Habeas Corpus.

September 18, 1912: Demurrer to Return to Writ of Habeas Corpus. [3]

Service of Process:

July 25, 1912: Writ issued and delivered to the United States Marshal for the District of Hawaii. Said writ afterwards returned into court with the following return by the said United States Marshal: "The within Petition, Writ of Habeas Corpus and Order were received by me on the 25th day of July, A. D. 1912, and is returned as executed upon Richard L. Halsey, Esq., Immigration Inspector in Charge at the Port of Honolulu, by exhibiting to him the original Petition, Writ of Habeas Corpus and Order on the 26th day of July, A. D. 1912, and, upon his looking at the original writs, he asked when the same was returnable and at what time he was to produce the body of TSURU TOMIMATSU; further service was made by handing

to and leaving with the said Richard L. Halsey certified copy of Petition, Writ of Habeas Corpus and Order on this 26th day of July, A. D. 1912."

July 26, 1912: Order Quashing Service of Writ filed and Order to Show Cause issued and delivered to the United States Marshal for the District of Hawaii. Said Order to Show Cause afterwards returned into court with the following return by the said United States Marshal: "The within ORDER TO SHOW CAUSE was received by me on the 26th day of July, A. D. 1912, and is returned as executed this 26th day of July, A. D. 1912, by hand, upon Richard L. Halsey, Immigration Inspector in Charge at the Port of Honolulu, by exhibiting to him the original Order to Show Cause and handing to and leaving with him a certified copy of Order to Show Cause, and *direct-* that he appear before the United States District Court on the 30th day of July, A. D. 1912 at 10 A. M." [4]

July 30, 1912: Hearing on Order to Show Cause.

September 18, 1912: Hearing on Return to Writ of Habeas Corpus by Immigration Inspector.

The above hearings were had before the Honorable CHARLES F. CLEMONS, Judge of said Court.

Decision:

September 17, 1912: Decision on Order to Show Cause and Order Allowing Writ to Issue.

September 18, 1912: Judgment filed and entered.

September 28, 1912: Petition for Appeal.

United States of America,
District of Hawaii,—ss.

I, A. E. Murphy, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; and account of the proceedings showing the service of the Order to Show Cause and Writ of Habeas Corpus and the time when the judgment herein was rendered and the Judge rendering the same, in the matter of the Petition of Tsuru Tomimatsu for a Writ of Habeas Corpus, Number 46, in the United States District Court for the Territory of Hawaii. [5]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 3d day of October, A. D. 1912.

[Seal] A. E. MURPHY,
Clerk, United States District Court, Territory of
Hawaii. [6]

*In the District Court of the United States, in and
for the District and Territory of Hawaii.*

In the Matter of the Petition of TSURU TOMI-
MATSU for a Writ of Habeas Corpus.

Petition for a Writ of Habeas Corpus.

To the Honorable SANFORD B. DOLE, Judge of
the District Court of the United States in and
for the District and Territory of Hawaii:

The undersigned, Tsuru Tomimatsu, petitioner herein, respectfully represents and shows to this Honorable Court as follows:

I.

That your petitioner is a subject of the Emperor of Japan; that heretofore, to wit, in or about the month of June, A. D. 1902, your petitioner arrived at Honolulu, city and county of Honolulu, in the Territory of Hawaii and United States of America, on board the Japanese steamship "Hong Kong Maru," she having embarked on said steamship in Japan, and thereupon your petitioner was duly admitted to the Territory of Hawaii and United States of America, and since the last-mentioned date has had her domicile in the Island of Maui, in the said Territory of Hawaii:

II.

That prior to the arrival of your petitioner in the Territory of Hawaii and United States of America as aforesaid, she had been duly married, according to the laws of Japan, to one Kotaro Tomimatsu; and that said Kotaro Tomimatsu, the husband of your petitioner, came together with your petitioner on the steamship [7] "Hong Kong Maru," as aforesaid, and was duly admitted to the Territory of Hawaii and United States with your petitioner as aforesaid, and since the last-mentioned date has had his domicile in the Island of Maui, in the said Territory of Hawaii.

III.

That on or about the 16th day of July, A. D. 1906, your petitioner departed from the port of Honolulu

aforesaid, aboard the American steamship "China," bound for the Empire of Japan, to which country petitioner desired to go for a visit and for the purpose of placing her children in school, and upon leaving said port of Honolulu, and at all times thereafter, petitioner intended to return to said Honolulu and to said Island of Maui, and to continue to reside in said Island of Maui; that during your petitioner's intended temporary absence as aforesaid petitioner's husband, said Kotaro Tomimatsu, remained domiciled in the Island of Maui aforesaid, and is now a cane contractor at Puunene, in said Island of Maui.

IV.

That petitioner returned to the port of Honolulu on or about the 10th day of June, A. D. 1912, aboard the American steamship "Mongolia," with the intention of returning to and residing with her said husband on said Island of Maui.

V.

That upon the arrival of your petitioner at the port of Honolulu, on the date last aforesaid, and at all times since the last-mentioned date, Richard L. Halsey, United States Immigration Inspector in Charge at the said port of Honolulu, has refused a landing to your petitioner, as petitioner is informed and believes, and upon such information and belief alleges and avers, under the claim or pretense that your petitioner is an immigrant alien and as such, a person belonging to an excluded class under [8] the Immigration Laws of the United States; whereas, in truth and in fact, your petitioner is a nonimmigrant alien and not subject to said immigration laws.

VI.

And your petitioner further shows that she is held in custody, detained, imprisoned and deprived of her liberty by said Richard L. Halsey, as petitioner is informed and believes and upon such information and belief alleges and avers, under and by virtue of the claim as aforesaid; and your petitioner further shows that said holding in custody, detention and imprisonment is illegal for the reasons hereinabove set forth.

WHEREFORE, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of habeas corpus, to be directed to the said Richard L. Halsey, United States Immigration Inspector in Charge as aforesaid, may issue in this behalf, so that your petitioner may be forthwith brought before this Honorable Court, to do, submit to, and receive what the law may direct.

Dated, Honolulu, July 24, 1912.

her
X

(Sgd.) TSURU mark TOMIMATSU,
Petitioner.

Witness to Mark:

(sgd.) P. H. BURNETT.

(sgd.) GEO. S. CURRY,

Attorney for Petitioner. [9]

United States of America,
Territory of Hawaii,
City and Country of Honolulu,—ss.

And now comes Tsuru Tomimatsu, who being first duly sworn upon her oath, according to law, deposes

and says, that she is the petitioner named in the foregoing petition subscribed by her; that she has heard the same read over to her and knows the contents thereof, and that the matters and things therein set forth and contained are just, true and correct, except as to those matters and things therein alleged on information and belief, and as to them she verily believes them to be true.

her
X

TSURU mark TOMIMATSU.

Witness to mark:

(Sgd.) P. H. BURNETT.

Subscribed and sworn to before me by said Tsuru Tomimatsu, this 24th day of June, A. D. 1912.

[Seal] (Sgd.) P. H. BURNETT,

Notary Public First Judicial Circuit, Territory of
Hawaii:

Let the writ issue as herein prayed.

July 25, 1912.

(Sgd.) S. B. DOLE,

Judge of the United States District Court, Hawaii.

[10]

*In the District Court of the United States, in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of TSURU TOMI-
MATSU for a Writ of Habeas Corpus.

Writ of Habeas Corpus [Dated July 25, 1912].

THE UNITED STATES OF AMERICA to Richard
L. Halsey, Esq., United States Immigration In-

spector in Charge, at the Port of Honolulu, Territory of Hawaii:

WE COMMAND YOU that the body of TSURU TOMIMATSU, in your custody detained, as it is said, together with the day and cause of her caption and detention, you safely have before the Honorable SANFORD B. DOLE, Judge of our District Court of the United States, in and for the District and Territory of Hawaii, to do and receive all and singular those things which the said Judge shall then and there consider of her in this behalf; and have you then and there this WRIT.

WITNESS the Honorable SANFORD B. DOLE, Judge of the District Court of the United States, in and for the District and Territory of Hawaii, this 25th day of July, A. D. 1912.

[Seal]

(Sgd.) A. E. MURPHY,

Clerk.

United States Marshal's Office.

MARSHAL'S RETURN.

The within Petition, Writ of Habeas Corpus and Order were received by me on the 25th day of July, A. D. 1912, and is returned as executed upon Richard L. Halsey, Esq., Immigration Inspector in Charge at the Port of Honolulu, by exhibiting to him the original Petition, Writ of Habeas Corpus and Order on the 26th day of July, A. D. 1912, and, upon his looking at the original writs, he asked when the same was returnable and at what time he was to produce the body of Tsuru Tomimatsu; further service was made by handing to and leaving with the said Richard

L. Halsey certified copy of Petition, Writ of Habeas Corpus and Order on this 26th day of July, A. D. 1912.

Dated Honolulu, T. H., July 26, 1912.

(Sgd.) E. R. HENDRY,
United States Marshal. [11]

[Endorsed]: No. 46. (Title of Court and Cause.)
Petition and Writ. Honolulu, July 25, 1912. Filed
July 25, 1912. (Sgd.) A. E. Murphy, Clerk. [12]

*In the District Court of the United States, in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of TSURU TOMI-
MATSU for a Writ of Habeas Corpus.

To the Honorable SANFORD B. DOLE, Judge of
Said Court:

Comes now the petitioner herein, Tsuru Tomi-
matsu, by her attorney, Geo. S. Curry, and moves
your Honor and this Honorable Court that the ser-
vice of the Writ of Habeas Corpus in this case be
quashed.

TSURU TOMIMATSU.

By (Sgd.) GEO. S. CURRY,
Her Attorney.

Let the service of the Writ of Habeas Corpus made
in this case be quashed.

(Sgd.) S. B. DOLE,
Judge of the United States District Court in and for
the District and Territory of Hawaii.

[Endorsed]: No. 46. (Title of Court and Cause.)
Order Quashing Service of Writ. Honolulu, July 26,

1912. Filed Jul. 26, 1912. A. E. Murphy, Clerk.
F. L. Davis, Deputy Clerk. [13]

*In the District Court of the United States, in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of TSURU TOMI-
MATSU for a Writ of Habeas Corpus.

Order to Show Cause.

Upon reading and filing the Petition for a Writ of Habeas Corpus in the above-entitled cause, it is ordered that the respondent herein Richard L. Halsey, do, on Tuesday, the 30th day of July, A. D. 1912, at the hour of 10 o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard, appear before me at the United States District Court, and show cause, if any he has, why the prayer of the petition should not be granted.

(Sgd.) S. B. DOLE,

Judge of the United States District Court, in and for
the District and Territory of Hawaii.

Honolulu, Hawaii, July 26, 1912.

United States Marshal's Office.

MARSHAL'S RETURN.

The within ORDER TO SHOW CAUSE was received by me on the 26th day of July, A. D. 1912, and is returned as executed this 26th day of July, A. D. 1912, by hand, upon Richard L. Halsey, Immigration Inspector in Charge at the Port of Honolulu, by exhibiting to him the original Order to Show Cause and handing to and leaving with him a certified copy of Order to Show Cause, and directing that

he appear before the United States District Court on the 30th day of July, A. D. 1912, at 10 A. M.

Dated, Honolulu, T. H., July 26, 1912.

E. R. HENDRY,

U. S. Marshal.

By (Sgd.) H. H. HOLT,

Office Deputy. [14]

[Endorsed]: No. 46. (Title of Court and Cause.)
Order to Show Cause. Honolulu, July 26, 1912.
Filed Jul. 26, 1912. A. E. Murphy, Clerk. By (Sgd.)
F. L. Davis, Deputy Clerk. [15]

Hearing on Order to Show Cause.

From the Minutes of the United States District
Court, Vol. 8, Page 224, Tuesday, July 30, 1912.
[Title of Court and Cause.]

On this day came Mr. George S. Curry, counsel of the above petitioner, and also came the United States by its District Attorney, Mr. R. W. Breckons, on behalf of R. L. Halsey, United States Inspector of Immigration, respondent herein, and this cause was called for hearing on Petition and Order to Show Cause. Thereupon due argument having been had by respective counsel, the within cause was by the Court taken under advisement. [16]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Application of TSURU TOMI-
MATSU for a Writ of Habeas Corpus.

Return of Richard L. Halsey to Order to Show Cause.

The Return of RICHARD L. HALSEY, Esq., United States Immigration Inspector in Charge at the Port of Honolulu, Territory of Hawaii, to the Order to Show Cause hereto attached:

In obedience to the order to show cause heretofore issued in this case, I do hereby certify and return to the Honorable SANFORD B. DOLE, Judge of the above-entitled court, as follows:

First. That I am at present, and have been for three months last past, the United States Inspector of Immigration in charge at the port of Honolulu, in the Territory of Hawaii.

Second. That heretofore and on, to wit, the 10th day of June, A. D. 1912, one Tsuru Tomimatsu arrived at the port of Honolulu, in the District and Territory of Hawaii, by the steamship "Mongolia" from the Empire of Japan.

Third. That subsequent to the arrival of the said Tsuru Tomimatsu at the port of Honolulu, and on the 19th day of June, A. D. 1912, an examination of the physical and mental condition [17] of the said Tsuru Tomimatsu was made by the officer of the United States Marine Hospital Service located at the port of Honolulu, the said medical officer having been theretofore duly and regularly appointed as such officer, and being an officer who, prior to the said examination and prior to the appointment as such officer, had had at least two years' experience in the practice of his profession since receiving the degree of Doctor of Medicine.

Fourth. That upon the completion of the said examination by the said medical officer, the said medical officer did certify in writing, as required by law, that the said Tsuru Tomimatsu was afflicted with a dangerous, contagious disease, to wit, Trachoma; a copy of which said certificate so made being attached hereto, made a part hereof, and marked Exhibit "A."

Fifth. That during all times in the month of June, A. D. 1912, Harry B. Brown, Edwin Farmer and Merlin J. Moore, were a duly appointed, qualified and acting Board of Special Inquiry at the port of Honolulu, in the said Territory and District.

Sixth. That the said certificate so made by the medical officer as aforesaid, was delivered, as by law required, to the said Board of Special Inquiry; that the said Board of Special Inquiry also received and heard evidence as to whether or not the said Tsuru Tomimatsu had returned to Japan with the intention of returning to Hawaii; that upon receipt of said certificate and upon the hearing of said testimony, the said Board did determine that the said Tsuru Tomimatsu was an alien immigrant afflicted with a dangerous, contagious disease, and that some four or five years prior to the date of said hearing she, the said Tsuru Tomimatsu, had gone from the Territory of Hawaii to Japan with the intention of remaining in Japan and not with the intention of returning to the Territory of Hawaii; and did thereupon duly and regularly order that the said Tsuru Tomimatsu be deported to the [18] country whence she came, to wit, to the Empire of Japan; a copy of the record of the said Board of Special Inquiry being attached thereto,

made a part hereof, and marked Exhibit "B". That the said hearing was full, fair and in every respect in accordance with law, and with the regulations of the Department of Immigration.

Seventh. That when the deportation of the said alien was ordered by the said Board of Special Inquiry, the said Tsuru Tomimatsu was informed thereof, and likewise informed of her right to appeal to the Secretary of Commerce and Labor on the question of whether or not she was an alien immigrant within the meaning of the Immigration Laws of the United States; that thereafter and on the 20th day of June, A. D. 1912, the said Tsuru Tomimatsu appealed from the decision of the said Board to the Secretary of Commerce and Labor at Washington; a copy of the said appeal being hereunto attached and marked Exhibit "C." That later, through her attorney, George S. Curry, she appeared before the Secretary of Commerce and Labor and submitted to the said Secretary a written brief on the question of whether or not she was an alien immigrant within the meaning of the law; a copy of her appearance and brief to the aforesaid Secretary is hereunto attached and marked Exhibit "D."

Eighth. That thereafter and on, to wit, the 18th day of July, A. D. 1912, the said Secretary of Commerce and Labor did duly and regularly deny the appeal of the said Tsuru Tomimatsu and sustained the finding of the said Board of Special Inquiry ordering the deportation of the said Tsuru Tomimatsu.

Wherefore, the said Richard L. Halsey prays that

the Petition heretofore filed in this case be dismissed, and for his costs in this behalf expended.

(Sgd.) RICHARD L. HALSEY. [19]

United States of America,
Territory of Hawaii,—ss.

Richard L. Halsey, being first duly sworn according to law, deposes and says that he is the Richard L. Halsey who has made the return to the order to show cause in the above-entitled cause; that he has read the said return, and knows the contents thereof, and that the facts therein stated are true.

(Sgd.) RICHARD L. HALSEY.

Subscribed and sworn to before me this 31st day of July, A. D. 1912.

[Seal]

(Sgd.) A. E. MURPHY,

Clerk, United States District Court, Territory of
Hawaii. [20]

**Exhibit "A" to Return to Order to Show Cause
[Medical Certificate].**

Form 541.

Department of Commerce
and Labor. Immigration.
Service.

MEDICAL CERTIFICATE.

Port of Honolulu, T. H.

Date June 19, 1912.

Name,—Tsuru Tomomatsu.

Native of Japan.

S. S. MONGOLIA.

Age 35. Sex, Female.

Race, Japanese. Date arrival, June 10, 1912.

Class ———. Manifest No. ———.

THIS IS TO CERTIFY That the above described person has this day been examined, and is found to be afflicted with trachoma, a dangerous contagious disease, which in my opinion could not have been detected at port of embarkation by a competent medical examination and which in my opinion cannot be cured in sixty days.

(Sgd.) F. E. TROTTER, P. A.

Surgeon, Public Health and Marine-Hospital Service. [21]

**Exhibit "B" to Return to Order to Show Cause
[Record of Board of Special Inquiry, U. S.
Immigration Service].**

U. S. IMMIGRATION SERVICE.

Port of Honolulu, T. H.

Record of Board of Special Inquiry, convened June 19, 1912. Members of Board: HARRY B. BROWN, EDWIN FARMER and MERLEN J. MOORE. Case of TSURU TOMIMATSU, N. 1-8, ex. SS. MONGOLIA, June 10, 1912.

Interpreter, Katsunuma.

Applicant, sworn by Inspector FARMER, testifies:

Q. Give your name, age and place of birth.

A. TSURU TOMIMATSU; 35 years old, born at ARAKI MURA, Fukuoka Ken, Japan.

Q. Where have you been living?

A. At MITSUMA MURA, Fukuoka Ken.

Q. Are you traveling alone? A. Yes.

Q. Are you married?

A. Yes. My husband, KÔTARO TOMIMATSU, is living at Puunene, Maui, where he works on a plantation.

Q. How old is he? A. 41 years.

Q. How long has he been in Hawaii?

A. 11 years.

Q. What is his occupation?

A. Plantation laborer.

Q. When were you married?

A. In Dec. 1895, in Japan.

Q. Were either of you ever married more than once? A. No.

Q. Have you any children?

A. Yes, three sons, GIICHI, 15 years old, MAS-ATO, 10 years old, and SHIGEYUKI, 5 years, and one daughter, SUGI, 13 years, all now in Japan, with my husband's father, DENHICHI TOMIMATSU, at MITSUKA MURA.

Q. Where were they born?

A. MASATO and SHIGEYUKI were born in Hawaii. The other two were born in Japan.

Q. Is your husband's mother living?

A. Yes, SATO TOMIMATSU. She is with her husband in Japan.

Q. How many brothers and sisters has your husband?

A. Two brothers, SADAKICHI and SUEKICHI, and two sisters, HATSU GOTO and ASANO TAHARA, all in Japan.

Q. Are your parents living?

A. My mother only, CHIYOI INAMASU, at ARAKI MURA.

Q. How many brothers and sisters have you?

A. Two brothers, SATARI, 49 years old, and NENOKICHI, 47 years, and three sisters, KIKU, 46 years, FUSA SAKAI, 42 years, and TOME

MATSUEDA, 37 years, all in Japan.

Q. Are any of your or your husband's relatives deformed or in any way unsound in mind or body, or have any of them ever been confined in a public institution? A. Not to my knowledge.

Q. Can you read and write? A. No.

Q. On which ship did you arrive and from what port?

Q. On the SS MONGOLIA, June 10, 1912, from Nagasaki, Japan.

Q. Who paid your passage?

A. My husband sent the money for it.

Q. What is your occupation? A. Weaver.

Q. Were you ever in the United States before?

A. Yes, I came to Hawaii 11 years ago with my husband. I stayed here five years and then went back to Japan. I have been there fully four years.

Q. Who went back to Japan with you four years ago?

A. I took with me my two sons, MASATO and SHIGEYUKI. [22]

Q. Have either of those two sons ever returned to Hawaii? A. No.

Q. Was GIICHI or SUGI ever in this country?

A. No.

Q. Have you been engaged in weaving in Japan ever since you went there four years ago?

A. Yes. Nothing but weaving.

Q. What wages did you receive as a weaver in Japan?

A. 75 sen a day to one sen, and boarded myself.

Q. What are your children doing in Japan?

A. GIICHI is a carpenter's apprentice and the others are going to school, except SHIGEYUKI, who is too young.

Q. Has your husband ever been back to Japan since he came here with you 11 years ago? A. No.

Q. What did you do when you were in Hawaii?

A. I did plantation work at Lahaina, Maui.

Q. Do you remember the date on which you went back to Japan?

A. I can not remember the date, but it was in the month of July, and on the SS. CHINA. I have forgotten the year.

Q. Why did you go back to Japan?

A. I wanted to see my children who were in Japan. My husband's parents also wanted to see me, and wanted to help me in the instruction of my children.

Q. When you first came to Hawaii, did you expect to go back to Japan?

A. Yes. I expected to go back to Japan again.

Q. Have you notified any one of your arrival?

A. I sent a wireless message to my husband from the steamer telling him that I was coming.

Q. How much did you pay for it? A. 6 yen.

Q. How much money have you? A. \$5.00.

Q. Have you any further statement to make?

A. No.

Q. When you went back to Japan did you expect to return to Hawaii again? A. Yes.

Q. If you are landed now is it your intention to remain in Hawaii always, or do you expect to return to Japan again?

A. I expect to stay here and work for ten years

and then return to Japan again.

Q. Do all your children expect to come to Hawaii sometime?

A. Yes, they all expect to come. Two of them, GIICHI and SHIGEYUKI are now at Nagasaki being treated for their eyes. When they are cured they will come to Hawaii.

Q. You have said that when you went to Japan four years ago you intended to return again to Hawaii. How long did you intend to stay in Japan?

A. One or two years.

Q. You have now stayed four years. Why did you not return sooner?

A. I waited for GIICHI to get through the grammar school.

her

TSURU X TOMIMATSU.

mark

Witness to mark—T. KATSUNUMA.

Sworn and subscribed to before me this 19th day of June, 1912.

(Sgd.) EDWIN FARMER,
Immigrant Inspector.

The foregoing testimony has been translated by me to the affiant named therein, and before signing the same she acknowledged it to be a correct record and fully understood by her.

(Sgd.) TOMIZO KATSUNUMA,

Interpreter. [23]

Witness, alleged husband, sworn, testifies:

Q. Give your name and age.

A. KOTARO TOMIMATSU; 42 years old.

Q. What is the purpose of your visit here to-day?

A. I come to meet my wife, TSURU TOMI-MATSU, who came on the SS. MONGOLIA, June 10.

Q. How old is she? A. 36 years.

Q. When were you married?

A. In 1894, in Japan.

Q. Were either of you ever married more than once? A. No.

Q. Was your wife ever in the United States before?

A. Yes. She came to Hawaii with me when I came in June, 1902, by the SS. HONG KONG MARU.

Q. Have you ever been back to Japan since that time? A. No.

Q. When did your wife go back?

A. In July, 1907, by the SS. CHINA.

Q. Did she go alone?

A. Mr. MIURA, a friend of mine, took her back with my son MASATO.

Q. How many children have you?

A. Three sons, GIICHI, 16 years old, MASATO, 9 years, and SHIGEYUKI, 5 years about, and one daughter, SUGI, 15 years, all in Japan. MASATO was born in Hawaii, but the rest were born in Japan. SHIGEYUKI was born about December, 1907, after my wife went back to Japan.

Q. With whom are they staying in Japan?

A. I do not know. I should have to see my wife to find out. They have been staying with her.

Q. Have your wife and children ever been back to Hawaii since they went away?

A. No, none of them.

Q. Are you wife's parents living?

A. Her mother only, Mrs. Inamasa, at ARAKI MURA, Fukuoka Ken, Japan.

Q. How many brothers and sisters has your wife?

A. She has two brothers, and three sisters, but I do not know their names. They are all in Japan.

Q. Are your parents living?

A. Yes, DENHICHI and SATO TOMIMATSU, at MITSUMA MURA, Fukuoka Ken.

Q. How many brothers and sisters have you?

A. Three brothers SADAKICHI, 45 years old, SUEKICHI, 38 years old, and IKUJI, about 29 years, and two sisters, HATSU GOTO, 34 years, and ASANO TAHARA, 27 years, all in Japan.

Q. Are any of your or your wife's relatives deformed, or in any way unsound in mind or body, or have any of them ever been confined in a public institution? A. Not to my knowledge.

Q. Who paid your wife's passage to Hawaii?

A. I did.

Q. What has your wife been doing in Japan?

A. Farm work.

Q. What is your occupation?

A. I plant cane on contract at Puunene, Maui.

Q. About how much money do you make?

A. \$1.00 a day or more.

Q. How much money have you saved?

Q. About \$400.00.

Q. Do you live in a camp?

A. Yes, I have one room.

Q. What will your wife do if she is landed?

A. Plantation work.

Q. What did she do before when she was in Hawaii?

A. Plantation work. We were on Lahaina Plantation, Maui, then.

Q. Do you expect to remain permanently in Hawaii, or do you expect to go back to Japan some-time to live?

A. I intend to go back to Japan, my native land, again.

Q. When you go back, do you expect to take your wife with you? A. Yes.

Q. Has that been your intention ever since you came to Hawaii?

A. Yes. After we saved money enough it has been my hope to go back to Japan. [24]

Q. When your wife went back to Japan was it your intention for her to come back again to Hawaii?

A. Yes. She intended to come back to this country after a short visit in Japan.

Q. How long did she intend to stay in Japan?

A. Two or three years. I intended to bring the children here after they had grown.

Q. Do you intend to bring all of your children to Hawaii? A. Yes.

Q. Why didn't they come with your wife?

A. I do not know. I want to talk about that with my wife.

Q. Have you any further statement to make?

A. I want to ask you to please let her land. Also I am expecting my children, so let them come ashore also.

Q. You say your wife intended to stay in Japan

two or three years. It has now been four or five years. Why did she not return sooner?

A. The children were too small.

Q. Have you received any message from your wife since her departure from Japan?

A. I received a letter from Japan, and a wireless message from her, from the boat.

Q. When did you receive the wireless message?

A. June 10.

Q. When did you receive the letter?

A. About two weeks before June 10.

Q. Why did you not come sooner?

A. I missed one boat and so could not come.

Q. Have you any further statement to make?

A. No.

(Sgd.) Japanese Characters.

Sworn and subscribed to before me this 19th day of June, 1912.

(Sgd.) EDWIN FARMER,
Immigrant Inspector.

The foregoing testimony has been translated by me to the affiant named therein, and before signing the same he acknowledged it to be a correct record and fully understood by him.

(Sgd.) TOMIZO KATSUNUMA,
Interpreter.

Case deferred to await the decision of the examining surgeon as to whether applicant is afflicted with disease. [25]

Order of Board Denying Applicant's Admission.

Case of TSURU TOMIMATSU, N. 1-8, ex. SS.
MONGOLIA, June 10, 1912.

Board reconvened June 20, 1912.

Applicant is certified by the examining surgeon of the U. S. P. H. & M. H. S. as being afflicted with TRACHOMA, a dangerous contagious disease.

EDWIN FARMER.—The applicant in this case, according to the testimony, formerly lived in Hawaii, but went back to Japan about four or five years ago with the intention of again returning to Hawaii after an absence of two or three years in Japan. Her husband has been in Hawaii ever since he came to these Islands, ten or eleven years ago, with his wife. If applicant's intention of sometime returning to Hawaii no matter how many years she may have remained in Japan, her husband still being in Hawaii, makes her a resident of Hawaii, it would seem that the intention of both husband and wife to ultimately return to Japan to live would, according to the same reasoning, make them both residents of Japan. I therefore move the applicant be denied admission and returned to Japan, the country whence she came, this decision being based on the certificate of the examining surgeon that she is afflicted with a contagious disease, and that she be allowed to appeal to the Department on the question as to whether or not she is a returning resident and therefore exempt from the Immigration Laws.

By Inspector MOORE.—I second the motion.

HARRY B. BROWN.—It is so ordered.

Applicant is informed that her return passage will

be paid by the steamship company which brought her to Hawaii.

She is also informed of her right of appeal on the question of residence.

(Sgd.) HARRY B. BROWN.

(Sgd.) EDWIN FARMER.

(Sgd.) MERLEN J. MOORE. [26]

**Exhibit "C" to Return to Order to Show Cause.
(Notice of Appeal from Decision of Board of
Special Inquiry to Secretary of Commerce and
Labor.)**

June 28, 1912.

R. L. Halsey, Esq.,

Inspector in Charge, U. S. I. S.

Honolulu, Hawaii.

Dear Sir:—

Having been notified that I have been denied admission to the United States at the port of Honolulu on my return here, I hereby notify you that I hereby and now appeal from the decision of the Board of Special Inquiry denying me admission to the Secretary of Commerce and Labor, at Washington. My Attorney will file brief for me on this appeal.

Faithfully yours,

her

(Sgd.) TSURU X TOMIMATSU.

mark

Witness to mark—

TOMIZO KATSUNUMA. [27]

**Exhibit "D" to Return to Order to Show Cause
[Appellant's Brief on Appeal to Secretary of
Commerce and Labor.]**

**BEFORE SECRETARY OF COMMERCE AND
LABOR.**

WASHINGTON, D. C.

**APPEAL FROM DECISION OF BOARD OF
SPECIAL INQUIRY, HONOLULU, HA-
WAIL.**

**In the Matter of TSURU TOMIMATSU, Domiciled
Alien.**

**To the Honorable, the Secretary of Commerce and
Labor:**

STATEMENT OF THE CASE:

From the testimony taken in this case it appears that the appellant herein, TSURU TOMIMATSU, was lawfully married to one KOTARO TOMIMATSU, in the Empire of Japan sometime during the month of December, A. D. 1895, and thereafter cohabited together as husband and wife, there being born of the marriage four children in all, two of them born in Japan, and two in the Territory of Hawaii; it further appears that this couple came here from Japan some 11 years ago, and went to live at Lahaina, Maui, where their two children were born, and lived there some years, making that place their home; that some four or five years ago, the wife, the appellant in this case, returned to Japan, with her children, for the purpose of making a short visit, the husband, Kotaro Tomimatsu, remaining here at their home in Lahaina, and has been here ever since, now being located at Puunene, Maui, and engaged in busi-

ness as a cane contractor. It appears that the wife's purpose in going to Japan some four or five years ago was for the purpose of placing the children in a Japanese school, and that the schooling of the children took longer than she expected, since she has overstayed the time she intended to spend in Japan. At any rate she now returns here to her home and husband, and had there not been some trouble with the Doctors in Japan would have brought with her their children; it appears that they will now [28] follow by a later boat. The husband has never left the Territory since he first came here.

The Board of Special Inquiry at the United States Immigration Station at this port has treated this appellant as an alien immigrant and denied her readmission on her return to her home and domicile here, from which finding and decision the said TSURU TOMIMATSU has appealed to your Honor, and now files this, her brief on appeal:

ARGUMENT.

No question is made in this case but that the appellant herein, Tsuru Tomimatsu, was lawfully admitted to the United States some 11 years ago, when she first came here with her husband, and no question is made but that her husband is lawfully in the United States; the appellant therefore does not come within the ruling in the case of *ex parte Patterson*, 166 Fed. 536, where it appeared that the residence of the alien in the United States was during minority, her parents being in a foreign country, and that she never did in fact acquire a domicile here; neither does she come within the ruling in the case of *FUN-*

ARO vs. WATCHORN, 164 Fed. 152, a New York case, where it appeared that the alien had not been lawfully admitted in the first place, and therefore could not acquire a domicile here. The contrary is the case here, the appellant was lawfully admitted here some 11 years ago when she arrived with her husband, and together with her husband established their domicile here.

The real question and the only question at issue in this case is whether this appellant is a returning domiciled alien. A domicile is that place in which a person has voluntarily fixed his abode, not for a mere special or temporary purpose, but with a present intention of making it his permanent home, 14 CYC. 833. But the appellant in this case is a married woman who is not living [29] separate and apart from her husband under any judicial decree of divorce or separation, nor has she been compelled to leave him because of brutal treatment, nor is there shown to be a partial or total incapacity on the part of the husband to acquire a domiciled. Such being the case the domicile of this appellant follows that of her husband.

“The law fixes the domicile of the wife by that of the husband and denies to her during cohabitation the power of acquiring a domicile of her own separate and apart from him.”

Atherton vs. Atherton, 181 U. S. 155.

Cheely vs. Clayton, 110 U. S. 701.

Chambers vs. Prince, 75 Fed. 176.

Burnham vs. Rangeley, 4 Fed. cases 2176.

The query then comes, what is the domicile of the

husband KOTARO TOMIMATSU? From the decision and finding of the Board of Special Inquiry in this case it appears that they have dealt with this case on the assumption that KOTARO TOMIMATSU never established a domicile here, basing it, I presume, on the following two questions and answers: Record, page #4.

“Do you expect to remain permanently in Hawaii, or do you expect to go back to Japan some time to live?”

A. I intend to go back to Japan, my native land, again.”

“Has that been your intention ever since you came to Hawaii?”

A. Yes, after we saved money enough it has been my hope to go back to Japan.”

And in this connection I desire to draw attention to the following: Record, page #4.

“Do you intend to bring all of your children to Hawaii? A. Yes.”

(Above quotations taken from the testimony of Kotaro Tomimatsu.)

The last question and answer show a present intention of making this Territory his permanent home, his home and his family's home. All that the two former questions and answers show are a floating intention to return to Japan, his domicile of origin at some indefinite period of time in the future, which is not sufficient to enable him to retain his original domicile in Japan. [30]

Domicile is not established by the proof of one or two facts.

“It depends not upon proving particular facts, but whether all the facts and circumstances taken together tending to show that a man has his home or domicile in one place over-balance all the like proofs tending to show it is another.”

Abington vs. North Bridgewater, 23 Pick. 170.

On the one hand, we have the establishment of a home here, a continuous residence here for 11 years, the wife returning here, after a temporary visit abroad, the bringing of the children in a very near future, the statement of the appellant that she expects to be here for 10 years longer at least, in fact, the establishment of a permanent home and place of abode here; and, on the other hand, we have a declaration on the part of Kotaro Tomimatsu that there is a floating intention to return to Japan at some future indefinite period of time. But the authorities do not stop here; they go further:

In Johnson vs. Smith, 43 Mo., at page 501, the Court said: “A man’s domicile is where he has fixed his ordinary dwelling without a present intention of removal, and that domicile may be changed to another notwithstanding the party on his departure may cherish a secret purpose of returning at some indefinite time in the future. Nor does the intent at the time of removal necessarily decide anything since the party’s intentions may change at a subsequent period. He may come to a different mind and fix his dwelling in another locality without any present purpose of leaving it and thus become domicili-

ated there notwithstanding his original purposes.”

In *Preston vs. Culbertson*, 58 Calif., at page 210, the Court said: “That he intended at some indefinite time in the future to remove (return) to Poverty Hill in Jamestown precinct did not make the latter place his residence.”

Plaintiff was born in New York, removed to New Jersey in 1868, resided there until his wife died in 1880, then took his children to *Scotland*. On return to the United States located in New Jersey, lived there, boarding until 1884, when he went to St. Louis where he engaged as a contractor, entering into a partnership with the defendant. Then closed his business in New Jersey. After living in St. Louis 2 years he sued in the Federal Court for a dissolution of the partnership, alleging that he was a citizen of New Jersey, testifying that his residence in Missouri was merely temporary [31] and it was not his purpose to give up his residence in New Jersey: HELD, that the facts set out did establish residence in Missouri, and that they were not overcome by a secret purpose to return to New Jersey when his business in Missouri was cleaned up, at some indefinite future period. Plea to jurisdiction sustained and bill dismissed. *Wright vs. Schneider*, 32 Fed. 705.

“The place to which a person has removed with the intent to remain there an indefinite time and has his place of present domicile is his place of domicile although he may entertain a floating intention to return at some future

period.” *Harris vs. Firth*, 11 Fed. cases, #6120.

A citizen of Massachusetts removed with his family to another State retaining no dwelling place in Massachusetts, though retaining his place of business here and intending to retain his domicile here and to return here at some future indefinite period of time, has NO DOMICILE IN MASSACHUSETTS:

Holmes vs. Greene, 75 Mass. 299, and at page 300-301, the Court said in part:

“It is true that in cases where the domicile of a party is in issue evidence of his intent may have an important and decisive bearing on the question, but it must be in connection with other facts to which the intent of the party gives efficacy and significance. Such is the case where a person has two dwelling houses in different towns in each of which he lives with his family an equal portion of the year. *Harvard College vs. Gore*, 5 Pick. 370. So, too, where a person leaves the country to be absent for purposes of business or pleasure for an indefinite period retaining his house and furniture in the place of his previous residence. *Sears vs. Boston*, 1 Met. 250. But no case can be found where the domicile of a party has been made to depend on a bald intent unaided by other proof. The *factum* and *animus* must concur in order to establish domicile. *Harvard College vs. Gore*, Pick. 570. The latter may be inferred from proof of the former, but evidence of a mere in-

tent cannot establish the fact of domicile.

One who is absent from and resides out of the commonwealth retaining no dwelling-house or boarding place here, though intending to return at some future indefinite time, has no domicile here.

Sleeper vs. Paige, 81 Mass. 349.

If a person has actually removed to another place with the intention of remaining there an indefinite time and has a place of fixed domicile, that place is to be deemed his place of domicile notwithstanding he may entertain a floating intention to return at some future period.

Anderson vs. Anderson, 42 Vt. 350.

Fram vs. Thorman, 102 Wisc. 653.

From these authorities there can be no question but that the husband Kotaro Tomimatsu, who came here 11 years ago, is still living here, and whose further stay here is indefinite and [32] who has a place of fixed domicile at Puunene, Maui,—is domiciliated here, and it being established by unbroken authority that the domicile of the wife follows that of the husband in a case such as this one, the domicile of the wife therefore is in the Territory of Hawaii. The major question being disposed of and it having been shown that this woman, the appellant herein, is a returning domiciled alien, is she amenable to the United States Immigration Laws on her return here from a visit abroad? I believe that under the following authorities she is clearly and beyond a doubt entitled to a landing on her return here:

Rogers vs. United States, 152 Fed. 346.

In re Blehsbaum, 141 Fed. 221.

United States vs. Aultman, 143 Fed. 922.

In re Panzara, 51 Fed. 275.

In re Martorelli, 63 Fed. 437.

In re Maiola, 67 Fed. 114.

United States vs. Sandrey, 48 Fed. 550.

In re Ota, 96 Fed. 487.

United States vs. Burke, 99 Fed. 895.

In re Di Simmons, 108 Fed. 942.

Mofitt vs. United States, 128 Fed. 375.

United States vs. Nakashima, 160 Fed. 843.

The latter case, United States vs. Nakashima, arose in this jurisdiction, and was decided both in the District Court here, and in the Circuit Court of Appeals of the Ninth Circuit, in favor of the returning domiciled alien, and against the United States, and settles the law in this jurisdiction. Under the law as laid down in the Nakashima case this appellant is clearly and beyond a doubt entitled to a landing here now on her return.

It may be further noted that the Department by its own rules has recognized and follows the case of U. S. vs. Nakashima, 160 Fed. 843, statistical rule VIII, providing:

“Alien residents and aliens residing abroad coming to the United States for a temporary trip, shall be classed as nonimmigrant aliens.
. . . ”

It having been shown that the appellant here established a domicile in the United States, and was a domiciled alien in 1907 [33] when she left this

country for a temporary visit to Japan, intending to return here again to her husband, that it is her intention to bring all of her children here to live with herself and her husband, and it having been further shown that the domicile of the husband of appellant has been in the United States for and during the last 11 years and still continues, and even though the appellant in fact intended to abandon her domicile here by her return to Japan in 1907 (and I submit there was no abandonment by this act), she did not have the power to do so, her domicile following that of her husband, and under the authorities cited, even though the appellant and her husband Kotaro intend at some indefinite future period to return to Japan, such bald intent is not sufficient to defeat the domicile here, established by their past acts, and continued by their present contemplated acts.

I submit, therefore, that beyond all question the appellant is a returning domiciled and non-immigrant alien, and as such entitled to a landing.

Dated, Honolulu, Hawaii, June 25, 1912.

Respectfully submitted,

TSURU TOMIMATSU,

By GEO. S. CURRY,

Her Attorney.

[Endorsed]: No. 46. (Title of Court and Cause.)
Return of Richard L. Halsey to Order to Show
Cause. Filed Jul. 31, 1912. (Sgd.) A. F. Murphy,
Clerk. [34]

**Minutes Re Decision on Order to Show Cause and
Order Allowing Writ to Issue, etc.**

From the Minutes of the United States District
Court, Vol. 8, Page 258, Tuesday, September
17, 1912.

[Title of Court and Cause.]

On this day came the above petitioner in person with her counsel, Mr. George S. Curry, and also came Mr. C. C. Bitting, Assistant United States District Attorney, on behalf of the respondent herein, Richard S. Halsey, and this cause was called for decision on Order to Show Cause. Thereupon the Court read its decision allowing the Writ to issue herein. Thereafter, pursuant to the said Writ, petitioner was brought into court and upon motion of Mr. Curry it was by the Court ordered that this cause be continued to September 18, 1912, at 10 o'clock A. M., for further disposition, and that the said petitioner be remanded to custody of the respondent.

[35]

[Decision on Order to Show Cause.]

*In the United States District Court for the Terri-
tory of Hawaii.*

APRIL, A. D. 1912, TERM.

In the Matter of the Application of TSURU TOMI-
MATSU for a Writ of Habeas Corpus.

September 17, 1912.

*Right of alien to land claimed on the ground
of domicil — Denial on a question of law —*

Habeas corpus.—Where the right of an alien to enter the United States is claimed on the ground of domicil, a denial thereof by the immigration officers on a question of law may be reviewed on an application for a writ of habeas corpus.

Jurisdiction of immigration officers—Habeas corpus.—When proceedings before immigration authorities show that they have acted without jurisdiction, relief may be had by writ of habeas corpus.

Domicil—Residence—Intention.—Residence in a certain locality for a period of years with one's family and the conduct of regular employment there, will prevail on the question of domicil, over any floating purpose such person may entertain to return at some indefinite future time to a former place of residence to reside.

Same—Married woman—Temporary residence away from home.—Temporary residence of a married woman away from home cannot, in ordinary circumstances, be set up against the presumption of law that the domicil of the husband is the domicil of the wife.

Resident alien returning to United States after temporary absence.—An alien who has acquired a domicil in the United States cannot be treated as an immigrant on his return to the United States after a temporary absence not involving a change of domicil. [36]

Construction of statutes as affected by revision or amendment.—Authoritative construction of a statute holds good as to a revision or amendment

thereof when the features which have been so construed remain substantially unchanged and do not suggest, in the revision or amendment, any intention of the legislature to change them.

PETITION FOR A WRIT OF HABEAS CORPUS
AND ORDER TO SHOW CAUSE.

G. R. CURRY, Attorney for Petitioner.

ROBERT W. BRECKONS, U. S. District Attorney, and C. C. BITTING, for Respondent.

Upon the filing of the petition an order was made for the respondent, Richard L. Halsey, alleged immigration inspector at the port of Honolulu, to show cause why the prayer of the petition should not be granted. The respondent admitted in his return that he was such immigration inspector and that the petitioner arrived in Honolulu, as alleged in her petition, June 10, 1912, in the steamship "Mongolia" from Japan, and further stated that the petitioner was found to be afflicted with the disease known as trachoma, and the matter was then referred to the board of special inquiry, which board took testimony upon the question "whether or not the said Tsuru Tomimatsu had returned to Japan with the intention of returning to Hawaii," and thereupon reached the conclusion that she "was an alien immigrant afflicted with a dangerous contagious disease, and that some four or five years prior to the date of the said hearing she . . . had gone from the Territory of Hawaii to Japan with the intention of remaining in Japan and not with the intention of returning to the Territory of Hawaii; and did thereupon duly

and regularly order that [37] the said *tsuru* Tomimatsu be deported." The respondent further stated that the petitioner took an appeal to the Secretary of Commerce and Labor, and, through her attorney, submitted a brief in the proceedings on appeal on the question "whether or not she was an alien immigrant within the meaning of the immigration laws of the United States"; and that the Secretary of Commerce and Labor sustained the finding of the board of special inquiry.

The exhibits attached to the return include a copy of the oral testimony of the petitioner and of her alleged husband, taken before the board of special inquiry. No other testimony appears to have been received except the certificate of the medical examiner that the petitioner was afflicted with trachoma, which in his opinion could not have been detected at the port of embarkation by a competent medical examination and could not be cured in *sixth* days. The testimony of the petitioner and Kotaro Tomimatsu, her alleged husband, tells a story of an industrious and thrifty family coming to this country about ten years ago in order to improve their financial opportunities, leaving two children in Japan. Two more children were born here, or, according to the recollection of Kotaro, one was born here and another after the wife reached Japan upon her return there five years ago, at which time she made the trip because, as she says, "I wanted to see my children who were in Japan. My husband's parents also wanted to see me and wanted to help me in the instruction of my children." On the question

whether or not the petitioner was an alien immigrant, the testimony is as follows: Tsuru Tomimatsu: Q. "When you first came to Hawaii did you expect to go back to Japan?" A. "Yes. I expected to go back to Japan again." Q. "If you are landed now is it your intention to remain in Hawaii always, or do you expect to return to Japan again?" A. "I expect to stay here and work for ten years and then return to Japan again." Q. "Do all of your children expect to come to Hawaii sometime?" A. "Yes, they [38] all expect to come." Q. "You have said that when you went to Japan four years ago you intended to return again to Hawaii. How long did you intend to stay in Japan?" A. "One or two years." Q. "You have now stayed four years. Why did you not return sooner?" A. "I waited for Giichi to get through the grammar school." Kotaro Tomimatsu: Q. "Do you expect to remain permanently in Hawaii, or do you expect to go back to Japan sometime to live?" A. "I intend to go back to Japan, my native land, again." Q. "When you go back, do you expect to take your wife with you?" A. "Yes." Q. "Has that been your intention ever since you came to Hawaii?" A. "Yes. After we saved money enough it has been my hope to go back to Japan." Q. "When your wife went back to Japan was it your intention for her to come back again to Hawaii?" A. "Yes. She intended to come back to this country after a short visit in Japan." Q. "How long did she intend to stay in Japan?" A. "Two or three years. I intended to bring the children here after they had grown." Q. "You say your wife in-

tended to stay in Japan two or three years. It has now been four or five years. Why did she not return sooner?" A. "The children were too small." There is considerable other testimony. I have given that portion which bears most directly upon the point at issue. In the rest, not given, there is nothing that is inconsistent with the above. Upon the testimony and the medical certificate the board of special inquiry rendered the following decision:

"Edwin Farmer: The applicant in this case, according to the testimony, formerly lived in Hawaii, but went back to Japan about four or five years ago with the intention of again returning to Hawaii after an absence of two or three years in Japan. Her husband has been in Hawaii ever [39] since he came to these islands, ten or eleven years ago, with his wife. If applicant's intention of sometime returning to Hawaii no matter how many years she may have remained in Japan, her husband still being in Hawaii, made her a resident of Hawaii, it would seem that the intention of both husband and wife to ultimately return to Japan to live would, according to the same reasoning, make them both residents of Japan. I therefore move the applicant be denied admission and returned to Japan, the country whence she came, this decision being based on the certificate of the examining surgeon that she is afflicted with a dangerous disease, and that she be allowed to appeal to the Department on the question as to whether or not she is a returning resident and

therefore exempt from the immigration laws.

By Inspector Moore: I second the motion.

Harry E. Brown: It is so ordered."

It is recognized by all the authorities that a Court having jurisdiction in proceedings for writs of habeas corpus may not interfere with the decisions of a board of special inquiry or of the Secretary of Commerce and Labor on appeal from such board, in cases touching the right of aliens to land in the United States wherever such board is dealing with issues of fact within its jurisdiction, and the alien has had an opportunity to be present at the hearing and to introduce testimony. *Chin Yow vs. United States*, 208 U. S. 8, 13; *United States vs. Sprung*, 187 Fed. 903, 906; *United States vs. Ju Toy*, 198 U. S. 253, 262. Where, however, the right of a person to enter the United States is claimed on the ground of citizenship or domicile and is denied by the immigration officers, it may be reviewed by such court on application for a writ of habeas corpus, when it depends upon a question of law. *United States vs. Williams*, 173 Fed. 627; *Davis vs. Manolis*, 179 Fed. 818, 822; *School or Magnetic Healing vs. McAnnulty*, 187 U. S. 94, 107-108. [40]

The petitioner does not contest the statement of the medical certificate that she was afflicted with trachoma. Her claim of a right to land is based upon the testimony given above of the established domicile of herself and her husband in Hawaii some ten years before, of her return to Japan four or five years before in relation to the welfare of her children with the intention of returning to Hawaii. The answer

recites that the board of special inquiry took testimony "as to whether or not the said Tsuru Tomimatsu had gone to Japan with the intention of returning to Hawaii," and thereupon and with the statement of the medical certificate, determined that she was an alien immigrant afflicted with a dangerous contagious disease, that four or five years prior thereto, she had gone to Japan with the intention of remaining there, and ordered her deportation to Japan. The decision of the board of special inquiry, exhibited, admits that the petitioner went to Japan with the intention of returning to Hawaii in two or three years, and decides for her deportation upon the following curious reasoning: "If applicant's intention of sometime returning to Hawaii, no matter how many years she may have remained in Japan, her husband still being in Hawaii, maked her a resident of Hawaii, it would seem that the intention of both husband and wife to ultimately return to Japan to live would, according to the same reasoning, make them both residents of Japan."

With this disposal of the case by the board of special inquiry upon a question of law, the authority of this Court to review its decision, under habeas corpus proceedings, accrues.

"It remains, therefore, the sole duty of the Court to determine whether or not the proceedings for the deportation of the relator have been according to law. If they have, he must be remanded; if they have not he must be released."

United States vs. Sibray, 178 Fed. 144, 147.

The testimony, which is not only uncontradicted but unquestioned by the petitioner, shows that husband and wife had acquired a domicile in Hawaii. Acts indicative of an intention of one to take up his abode in a certain locality for a period of years, together with his actual residence in such locality, "must prevail over any secret purpose which he may have entertained to return at some indefinite future time" to a former place of residence and make that his home. *Wright vs. Snyder*, 32 Fed. 705, 706; *Holmes vs. Green*, 73 Mass. 299, 301. Under such circumstances, the temporary return of the wife to Japan, obviously for family reasons, could not destroy her domicile in Hawaii. That such visit was of a temporary nature is shown both by the testimony and her return to Hawaii.

"Actual residence—residence in point of fact, signifies nothing in the case of a married woman, and shall not, in ordinary circumstances, be set up against the presumption of law that she resides with her husband." *Warrender vs. Warrender*, 9 Bligh. N. S. 89, 104: 5 Eng. Reprint, 1227, 1233; *Re Daly's Settlement*, 25 Beav. 456, 460: 53 Eng. Reprint, 711, 713; *Dolphin vs. Robins*, 7 H. L. C. 390; 11 Eng. Reprint, 156.

If this reasoning is correct, the petitioner comes under the rule established in many federal decisions to the effect that "an alien who has acquired a domicile in the United States cannot thereafter, and while still retaining such domicile, legally be treated as an immigrant on his return to this country after a temporary absence for a specific purpose, not involving

a change of domicil." *Rodgers vs. United States ex rel. Buchsbaum*, 152 Fed. 346, syl. (1907), and *United States vs. Aultman & Company*, 143 Fed. 922 (1907).

Although the act "to regulate the immigration of aliens into the United States," approved March 3, 1903, was repealed, except as to section 34, relative to another subject, by the [42] act of February 20, 1907, bearing the same title, the decisions under former statutes upon this point apply as well to the later statute, whose object as expressed by the title is to regulate the immigration of aliens into the United States. This object is borne out by the consistent expression of the statute throughout, and by the constant appearance and repetition of words and sentences that are inconsistent with any other purpose. For instance, the taxes collected from aliens entering the United States are constituted a permanent appropriation called the "immigrant fund," to be used for the "expenses of regulating the immigration of aliens into the United States." Sec. 1. The "immigrant fund" is also referred to in sections 19, 20, 24 and 39. Section 3 relates to the importation of any alien woman or girl for the purpose of prostitution. Sections 4, 5 and 6 deal with the "importation or migration" of contract laborers. Section 7 forbids transportation companies from soliciting or encouraging the "immigration of any aliens." Section 8 provides punishment for anyone who may land any alien not admitted by an "immigrant inspector" in the United States. Sections 12, 14, 19, 22, 24, 25, 32, 36 and 40 refer to the "Com-

missioner General of Immigration," who by virtue of section 22, has charge of all laws relating to the "immigration of aliens." Sections 12, 14, 15, 16, 17, 18, 22, 24 and 25 refer to "immigration officers." Section 24 refers to "immigrant inspectors and other immigration officers." Section 25 provides for boards of special inquiry "for the prompt determination of all cases of immigrants detained under the provision of law." Sections 30, 31 and 40 refer to "immigrant stations," and authorize the President to negotiate treaties for regulating the "immigration of aliens to the United States." Section 40 provides for a "division of information in the Bureau of Immigration and Naturalization to promote beneficial distribution of aliens admitted into the United States among the several States and Territories [43] desiring immigration." Section 42 treats of the accomodation to be given "immigrant passengers" on vessels bringing them to the United States. The word "alien" is used substantially as it is used in the previous statutes; only once is the phrase "alien immigrant" used in the act of 1891, and not at all in the act of 1903.

There appears little room for argument that the numerous authorities that support the construction that the restrictive measures of the acts of 1891 and 1903 do not apply to alien residents of the United States, do not support the same construction of the act of 1907.

An additional ground of jurisdiction of this court in this case is suggested by the case of *Ex parte*

Watchorn, 160 Fed. 1014, 1016, in which the Court says, "Doubtless the determination of the immigration authorities upon all questions of fact, even if made upon legally incompetent or inconclusive evidence, is final, but when the proceedings before them show undisputably that they are acting without jurisdiction, relief may be had by writ of habeas corpus and refers to *Gonzales vs. Williams*, 192 U. S. 1.

The writ prayed for may issue.

(Sgd.) SANFORD B. DOLE,
Judge, U. S. District Court.

[Endorsed]: No. 46. (Title of Court and Cause.)
Decision of Dole, J. On Motion to Show Cause.
Filed Tuesday, September 17, 1912. A. E. Murphy,
Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [44]

*In the District Court of the United States, in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of TSURU TOM-
IMATSU, for a Writ of Habeas Corpus.

Writ of Habeas Corpus Dated September 17, 1912].
THE UNITED STATES OF AMERICA, to
RICHARD L. HALSEY, Esq., United States
Immigration Inspector in Charge, at the Port of
Honolulu, Territory of Hawaii:

We command you that the body of TSURU TOM-
IMATSU, in your custody detained, as it is said, to-
gether with the day and cause of her caption and
detention, you safely have before the Honorable
SANFORD B. DOLE, Judge of our District Court

of the United States, in and for the district and Territory of Hawaii, on the 17th day of September, A. D. 1912, at the hour of 4 o'clock in the afternoon of said day, to do and receive all and singular those things which the said Judge shall then and there consider of her in this behalf; and have you then and there this WRIT:

Witness the Honorable SANFORD B. DOLE, Judge of the District Court of the United States, in and for the District and Territory of Hawaii, this 17th day of September, A. D. 1912.

[Seal]

A. E. MURPHY,

Clerk.

By (Sgd.) F. L. Davis,

Deputy Clerk. [45]

United States Marshal's Office.

MARSHAL'S RETURN.

The within WRIT OF HABEAS CORPUS was received by me on the 17th day of September, A. D. 1912, and is returned as executed upon Richard L. Halsey, Esq., U. S. Immigration Inspector in Charge at the Port of Honolulu, by handing to and leaving with him a certified copy of the within Write of Habeas Corpus and directing that he produce the body of TSURU TOMIMATSU before the United States District Court at Honolulu at 4 P. M., on the 17th day of September, A. D. 1912.

Dated, Honolulu, September 17, 1912.

E. R. HENDRY,

U. S. Marshal.

By (Sgd.) H. H. HOLT,

Chief Office Deputy.

[Endorsed]: No. 46. (Title of Court and Cause.)
Writ of Habeas Corpus. Dated, Honolulu, Hawaii,
September 17, 1912. Filed Sep. 17, 1912. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [46]

Order in Re Release of Petitioner, etc.

From the Minutes of the United States District
Court, Vol. 8, Page 259, Wednesday, September
18, 1912.

[Title of Court and Cause.]

On this day came the above petitioner in person
and with her counsel, Mr. George S. Curry, and Mr.
R. W. Breckons, United States District Attorney,
who appeared on behalf of the respondent herein,
Richard L. Halsey, and this cause was called for fur-
ther disposition. Thereupon and pursuant to the
decision heretofore filed herein, the Court ordered
that said petitioner be released from custody, where-
upon Mr. Breckons having noted an objection to said
ruling and having given notice of an appeal herein,
the Court ordered that pending appeal, petitioner
should give a bond herein in the sum of \$500 for her
appearance to answer the final mandate of this Court,
Judgment having been presented herein and signed
by the Court, the sureties on the above bond were
called, sworn and accepted as such by the Court.

[47]

In the District Court of the United States in and for the District and Territory of Hawaii.

In the Matter of the Petition of TSURU TOMIMATSU for a Writ of Habeas Corpus.

Judgment.

At the regular April, A. D. 1912, term of the District Court of the United States in and for the District and Territory of Hawaii, held in the courtroom of said court, in Honolulu, City and County of Honolulu, in the Territory of Hawaii and District aforesaid, on Wednesday, the 17th day of September, A. D. 1912, the above-entitled cause having heretofore been heard on the pleadings and arguments by counsel for the respective parties and due deliberation had thereon, the Court finds that the above-named petitioner Tsuru Tomimatsu is entitled to be discharged, subject to the taking of an appeal, in which case she may be released upon giving a recognizance with sureties in the sum of Five Hundred Dollars (\$500.00) to answer the judgment of the Appellate Court.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-named petitioner TSURU TOMIMATSU be and she is hereby discharged from custody herein subject to the taking of an appeal, and subject to exceptions by the United States of America.

And the Court being advised that the above-entitled cause will be removed to the Appellate Court by proper proceedings to be had in that behalf.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the above-named petitioner TSURU TOMIMATSU, give her recognizance with surety, in the sum and amount of Five Hundred Dollars (\$500.00), to answer the judgment of the Appellate Court, and that [48] upon the giving of such recognizance the said petitioner, TSURU TOMIMATSU, be released from custody.

GIVEN, MADE AND DATED, at Honolulu, City and County of Honolulu, Territory and District aforesaid, this 18th day of September, A. D. 1912.

(Sgd.) S. B. DOLE,
Judge of said Court.

[Endorsed]: No. 46. (Title of Court and Cause.) Judgment. Entered in J. D. Book 2, at page 363. Dated, September 18, 1912. Filed Sep. 18, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [49]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of TSURU TOMIMATSU for a Writ of Habeas Corpus.

Return of Richard L. Halsey to the Writ of Habeas Corpus.

The Return of RICHARD L. HALSEY, Esq., United States Immigration Inspector in Charge at the Port of Honolulu, Territory of Hawaii, to the writ of habeas corpus hereto attached:

In obedience to the writ of habeas corpus heretofore issued in this case, I do hereby certify and re-

turn to the Honorable SANFORD B. DOLE, Judge of the above-entitled court, as follows:

First. That I am at present, and have been for three months last past, the United States Inspector of Immigration in charge at the port of Honolulu, in the Territory of Hawaii.

Second. That heretofore and on, to wit, the 10th day of June, A. D. 1912, one TSURU TOMIMATSU arrived at the port of Honolulu, in the District and Territory of Hawaii, by the steamship "Mongolia" from the Empire of Japan.

Third. That subsequent to the arrival of the said TSURU TOMIMATSU at the port of Honolulu, and on the 19th day of June, A. D. 1912, an examination of the physical and mental condition of the said TSURU TOMIMATSU was made by the officer of the United States Marine Hospital Service located at the port of Honolulu, the said medical officer having been heretofore duly [50] and regularly appointed as such officer, and being an officer who, prior to the said examination and prior to the appointment as such officer, had had at least two years' experience in the practice of his profession since receiving the degree of Doctor of Medicine.

Fourth. That upon the completion of the said examination by the said medical officer, the said medical officer did certify in writing, as required by law, that the said TSURU TOMIMATSU was afflicted with a dangerous contagious disease, to wit, Trachoma; a copy of which said certificate so made being attached hereto, made a part hereof, and marked exhibit "A."

Fifth. That during all times in the month of

June, A. D. 1912, HARRY B. BROWN, EDWIN FARMER and MERLIN J. MOORE, were a duly appointed, qualified and acting Board of Special Inquiry at the port of Honolulu, in the said Territory and District.

Sixth. That the said certificate so made by the medical officer as aforesaid, was delivered, as by law required, to the said Board of Special Inquiry; that the said Board of Special Inquiry also received and heard evidence as to whether or not the said TSURU TOMIMATSU had returned to Japan with the intention of returning to Hawaii; that upon receipt of said certificate and upon the hearing of said testimony, the said Board did determine that the said TSURU TOMIMATSU was an alien immigrant afflicted with a dangerous, contagious disease, and that some four or five years prior to the date of said hearing she, the said TSURU TOMIMATSU, had gone from the Territory of Hawaii to Japan with the intention of remaining in Japan and not with the intention of returning to the Territory of Hawaii; and did thereupon duly and regularly order that the said TSURU TOMIMATSU be deported to the country whence she came, to wit, to the Empire of Japan; a copy of the record of the said Board of Special Inquiry being attached thereto, made a part hereof, and marked exhibit [51] "B." That the said hearing was full, fair and in every respect in accordance with law, and with the regulations of the Department of Immigration.

Seventh. That when the deportation of the said alien was ordered by the said Board of Special In-

quiry, the said TSURU TOMIMATSU was informed thereof, and likewise informed of her right to appeal to the Secretary of Commerce and Labor on the question of whether or not she was an alien immigrant within the meaning of the Immigration Laws of the United States; that thereafter and on the 20th day of June, A. D. 1912, the said TSURU TOMIMATSU appealed from the decision of the said Board to the Secretary of Commerce and Labor at Washington; a copy of the said appeal being hereunto attached and marked exhibit "C." That later, through her attorney, GEORGE S. CURRY, she appeared before the Secretary of Commerce and Labor and submitted to the said Secretary a written brief on the question of whether or not she was an alien immigrant within the meaning of the law; a copy of her appearance and brief to the aforesaid Secretary is hereunto attached and marked exhibit "D."

Eighth. That thereafter and on, to wit, the 18th day of July, A. D. 1912, the said Secretary of Commerce and Labor did duly and regularly deny the appeal of the said TSURU TOMIMATSU and sustained the finding of the said Board of Special Inquiry ordering the deportation of the said TSURU TOMIMATSU.

WHEREFORE, the said RICHARD L. HALSEY prays that the writ of habeas corpus heretofore issued in this cause be discharged, and for his costs in this behalf expended.

(Sgd.) RICHARD L. HALSEY. [52]

United State of America,
Territory of Hawaii,—ss.

Richard L. Halsey, being first duly sworn, according to law, deposes and says that he is the Richard L. Halsey who has made the return to the writ of habeas corpus in the above-entitled cause; that he has read the said return, and knows the contents thereof, and that the facts therein stated are true.

(Sgd.) RICHARD L. HALSEY.

Subscribed and sworn to before me this 18th day of September, A. D. 1912.

[Seal] (Sgd.) F. L. DAVIS,
Deputy Clerk, United States Circuit Court, Territory
of Hawaii.

Exhibit "A" to Return to Writ of Habeas Corpus
[Medical Certificate].

Form 541

Department of Commerce
and Labor. Immigration
Service.

MEDICAL CERTIFICATE.

Port of Honolulu, T. H.

Date June 19, 1912.

Name,—Tsuru Tomimatsu

Native of Japan.

S. S. MONGOLIA

Age, 35. Sex, Female.

Race, Japanese. Date of arrival, June 10, 1912.

Class ——— Manifest No. ———

THIS IS TO CERTIFY that the above described person has this day been examined, and is found to

be afflicted with trachoma, a dangerous contagious disease, which in my opinion could not have been detected at port of embarkation by a competent medical examination and which in my opinion can not be cured in *sixth* days.

(Sgd.) F. E. TROTTER, P. A.

Surgeon,

Public Health and Marine-Hospital Service. [53]

**Exhibit "B" to Return to Writ of Habeas Corpus
[Record of Board of Special Inquiry, U. S.
Immigration Service].**

U. S. IMMIGRATION SERVICE.

Port of Honolulu, T. H.

Record of Board of Special Inquiry, convened
June 19, 1912.

Members of Board: HARRY B. BROWN, EDWIN FARMER and MERLIN J. MOORE, Case of TSURU TOMIMATSU, N. 1-8, ex. SS. MONGOLIA, June 10, 1912.

Interpreter, KATSUNUMA.

Applicant, sworn by Inspector FARMER, testifies:

Q. Give your name, age and place of birth.

A. TSURU TOMIMATSU, 35 years old, born at ARAKI MURA, Fukuoka Ken, Japan.

Q. Where have you been living?

A. At MITSUMA MURA, Fukuoka Ken.

Q. Are you traveling alone? A. Yes.

Q. Are you married?

A. Yes. My husband, KOTARO TOMIMATSU, is living at Puunene, Maui, where he works on a plantation.

Q. How old is he? A. 41 years.

Q. How long has he been in Hawaii?

A. 11 years.

Q. What is his occupation?

A. Plantation laborer.

Q. When were you married?

A. In Dec. 1895, in Japan.

Q. Were either of you ever married more than once? A. No.

Q. Have you any children?

A. Yes, three sons, GIICHI, 15 years old, MASATO, 10 years old, and SHIGEYUKI, 5 years, and one daughter, SUGI, 13 years all now is Japan, with my husband's father, DENHICHI TOMIMATSU, at MITSUKA MURA.

Q. Where were they born?

A. MASATO and SHIGEYUKI were born in Hawaii. The other two were born in Japan.

Q. Is your husband's mother living?

A. Yes, SATO TOMIMATSU. She is with her husband in Japan.

Q. How many brothers and sisters has your husband?

A. Two brothers, *brothers*, SADAKICHI and SUEKICHI, and two sisters, HATSU GOTO and ASANO TAHARA, all in Japan.

Q. Are your parents living?

A. My mother only, CHIYOI INAMASU, at ARAKI MURA.

Q. How many brothers and sisters have you?

A. Two brothers, SATARO, 49 years old, and NENOKICHI, 47 years, and three sisters, KIKU, 46 years, FUSA SAKAI, 42 years, and TOME MAT-

SUEDA, 37 years, all in Japan.

Q. Are any of your or your husband's relatives deformed, or in any way unsound in mind or body, or have any of them ever been confined in a public institution? A. Not to my knowledge.

Q. Can you read and write? A. No.

Q. On which ship did you arrive and from what port?

A. On the SS. MONGOLIA, June 10, 1912, from Nagasaki, Japan.

Q. Who paid your passage?

A. My husband sent the money for it.

Q. What is your occupation? A. Weaver.

Q. Were you ever in the United States before?

A. Yes, I came to Hawaii 11 years ago with my husband. I stayed here five years and then went back to Japan. I have been there fully four years.

Q. Who went back to Japan with you four years ago?

A. I took with me my two sons MASATO and SHIGEYUKI. [54]

Q. Have either of these two sons ever returned to Hawaii? A. No.

Q. Was GIICHI or SUGI ever in this country?

A. No.

Q. Have you been engaged in weaving in Japan ever since you went there four years ago?

A. Yes, nothing but weaving.

Q. What wages did you receive as a weaver in Japan?

A. 75 sen a day to one sen, and boarded myself.

Q. What are your children doing in Japan?

A. GIICHI is a carpenter's apprentice and the others are going to school, except SHIGEYUKI, who is too young.

Q. Has your husband ever been back to Japan since he came here with you 11 years ago?

A. No.

Q. What did you do when you were in Hawaii?

A. I did plantation work at Lahaina, Maui.

Q. Do you remember the date on which you went back to Japan?

A. I cannot remember the date, but it was in the month of July, and on the SS. CHINA. I have forgotten the year.

Q. Why did you go back to Japan?

A. I wanted to see my children who were in Japan. My husband's parents also wanted to see me, and wanted to help me in the instruction of my children.

Q. When you first came to Hawaii did you expect to go back to Japan?

A. Yes. I expected to go back to Japan again.

Q. Have you notified any one of your arrival?

A. I sent a wireless message to my husband from the steamer telling him that I was coming.

Q. How much did you pay for it? A. 6 yen.

Q. How much money have you? A. \$5.00.

Q. Have you any further statement to make?

A. No.

Q. When you went back to Japan did you expect to return to Hawaii again? A. Yes.

Q. If you are landed now is it your intention to remain in Hawaii always, or do you expect to return

to Japan again?

A. I expect to stay here and work for ten years and then return to Japan again.

Q. Do all of your children expect to come to Hawaii sometime?

A. Yes, they all expect to come. Two of them GIICHI and SHIGYUKI are now at Nagasaki being treated for their eyes. When they are cured they will come to Hawaii.

Q. You have said that when you went to Japan four years ago you intended to return again to Hawaii. How long did you intend to stay in Japan?

A. One or two years.

Q. You have now stayed four years. Why did you not return sooner?

A. I waited for GIICHI to get through the grammar school.

her
TSURU X TOMIMATSU.
mark

Witness to mark:

T. KATSUNUMA.

Sworn and subscribed to before me this 19th day of June, 1912.

(Sgd.) EDWIN FARMER,
Immigrant Inspector.

The foregoing testimony has been translated by me to the affiant named therein, and before signing the same she acknowledged it to be a correct record and fully understood by her.

(Sgd.) TOMIZO KATSUNUWA,
Interpreter. [55]

Witness, alleged husband, sworn, testifies:

Q. Give your name and age.

A. KOTARO TOMIMATSU, 42 years old.

Q. What is the purpose of your visit here today?

A. I come to meet my wife, TSURU TOMIMATSU, who came on the SS. MONGOLIA, June 10.

Q. How old is she? A. 36 years.

Q. When were you married?

A. In 1894, in Japan.

Q. Were either of you ever married more than once? A. No.

Q. Was your wife ever in the United States before?

A. Yes, she came to Hawaii with me when I came in June, 1902, by the SS. HONG KONG MARU.

Q. Have you ever been back to Japan since that time? A. No.

Q. When did your wife go back?

A. In July, 1907, by the SS. CHINA.

Q. Did she go along?

A. Mr. MIURA, a friend of mine, took her back with my son MASATO.

Q. How many children have you?

A. Three sons, GIICHI, 16 years old, MASATO, 9 years, and SHIGEYUKI, 5 years about, and one daughter, SUGI, 15 years, all in Japan. MASATO was born in HAWAII, but the rest were born in Japan. SHIGEYUKI was born about December, 1907, after my wife went back to Japan.

Q. With whom are they staying in Japan?

A. I do not know. I should have to see my wife to find out. They have been staying with her.

Q. Have your wife and children ever been back to

Hawaii since they went away?

A. No, none of them.

Q. Are your wife's parents living?

A. Her mother only, Mrs. INAMASA, at ARAKI MURA, Fukuoka Ken, Japan.

Q. How many brothers and sisters has your wife?

A. She has two brothers and three sisters, but I do not know their names. They are all in Japan.

Q. Are your parents living?

A. Yes, DENHICHI and SATO TOMIMATSU, at MITSUMA MURA, Fukuoka Ken.

Q. How many brothers and sisters have you?

A. Three brothers, SADAKICHI, 45 years old, SUEKICHI, 38 years, and IKUJI, about 39 years, and two sisters, HATSU GOTO, 34 years, and ASANO TAHARA, 27 years, all in Japan.

Q. Are any of your or your wife's relatives deformed, or in any way unsound in mind or body, or have any of them ever been confined in a public institution? A. Not to my knowledge.

Q. Who paid your wife's passage to Hawaii?

A. I did.

Q. What has your wife been doing in Japan?

A. Farm work.

Q. What is your occupation?

A. I plant cane on contract at Puunene, Maui.

Q. About how much money do you make?

A. \$1.00 a day or more.

Q. How much money have you saved?

A. About \$400.00.

Q. Do you live in a camp?

A. Yes, I have one room.

Q. What will your wife do if she is landed?

A. Plantation work.

Q. What did she do before when she was in Hawaii?

A. Plantation work. We were on Lahaina Plantation, Maui, then.

Q. Do you expect to remain permanently in Hawaii, or do you expect to go back to Japan sometime to live?

A. I intend to go back to Japan, my native land, again.

Q. When you go back, do you expect to take your wife with you? A. Yes.

Q. Has that been your intention ever since you came to Hawaii?

A. Yes. After we saved money enough it has been my hope to go back to Japan. [56]

Q. When your wife went back to Japan was it your intention for her to come back again to Hawaii?

A. Yes. She intended to come back to this country after a short visit in Japan.

Q. How long did she intend to stay in Japan?

A. Two or three years. I intended to bring the children here after they had grown.

Q. Do you intend to bring all of your children to Hawaii? A. Yes.

Q. Why didn't they come with your wife?

A. I do not know. I want to talk about that with my wife.

Q. Have you any further statement to make?

A. I want to ask you to please let her land. Also

I am expecting my children, so let them come ashore also.

Q. You say your wife intended to stay in Japan two or three years. It has now been four or five years. Why did she not return sooner?

A. The children were too small.

Q. Have you received any message from your wife since her departure from Japan?

A. I received a letter from Japan, and a wireless message from her, from the boat.

Q. When did you receive the wireless message?

A. June 10.

Q. When did you receive the letter?

A. About two weeks before June 10.

Q. Why did you not come sooner?

A. I missed one boat and so could not come.

Q. Have you any further statement to make?

A. No.

(Sgd.) EDWIN FARMER,
Immigrant Inspector.

The foregoing testimony has been translated by me to the affiant named therein, and before signing the same he acknowledged it to be correct record and fully understood by him.

(Sgd.) TOMIZO KATSUNUMA,
Interpreter.

Order of Board Denying Applicant's Admission.

Case deferred to await the decision of the examining surgeon as to whether applicant is afflicted with disease.

Case of TSURU TOMIMATSU, 1-8, ex. SS. MONGOLIA, June 10, 1912.

Board reconvened June 20, 1912.

Applicant is certified by the examining surgeon of the U. S. P. H. & M. H. S., as being afflicted with TRACHOMA, a dangerous contagious disease.

EDWIN FARMER: The applicant in this case, according to the testimony, formerly lived in Hawaii, but went back to Japan about four or five years ago with the intention of again returning to Hawaii after an absence of two or three years in Japan. Her husband has been in Hawaii ever since he came to these Islands, ten or eleven years ago, with his wife. If applicant's intention of sometime returning to Hawaii no matter how many years she may have remained in Japan, her husband still being in Hawaii, makes her a resident of Hawaii, it would seem that the intention of both husband and wife to ultimately return to Japan to live would, according to the same reasoning, make them both residents of Japan. I therefore move the applicant be denied admission and returned to Japan, the country whence she came, this decision being based on the certificate of the examining surgeon that she is afflicted with a contagious disease, and that she be allowed to appeal to the Department on the question as to whether [57] or not she is a returning resident and therefore exempt from the Immigration Laws.

By Inspector MOORE: I second the motion.

HARRY B. BROWN: It is so ordered.

Applicant is informed that her return passage will be paid by the steamship company which brought her to Hawaii.

She is also informed of her right of appeal on the question of residence.

(Sgd.) HARRY B. BROWN,

(Sgd.) EDWIN FARMER,

(Sgd.) MERLIN J. MOORE.

**Exhibit "C" to Return to Writ of Habeas Corpus
[Notice of Appeal from Decision of Board of
Special Inquiry to Secretary of Commerce and
Labor].**

June 28, 1912.

R. L. Halsey, Esq.,

Inspector in Charge, U. S. I. S.,

Honolulu, Hawaii.

Dear Sir:

Having been notified that I have been denied admission to the United States at the port of Honolulu on my return here, I hereby notify you that I hereby and now appeal from the decision of the Board of Special Inquiry denying me admission to the Secretary of Commerce and Labor, at Washington. My attorney will file brief for me on this appeal.

Faithfully yours,

her
(Sgd.) TSURU X TOMIMATSU.
mark

Witness to mark:

TOMIZO KATSUNUMA. [58]

**Exhibit "D" to Return to Writ of Habeas Corpus
[Appellant's Brief on Appeal to Secretary of
Commerce and Labor].**

BEFORE SECRETARY OF COMMERCE AND
LABOR, WASHINGTON, D. C.

APPEAL FROM DECISION OF BOARD OF SPE-
CIAL INQUIRY, HONOLULU, HAWAII.

In the Matter of TSURU TOMIMATSU, Domiciled
Alien.

To the Honorable, the Secretary of Commerce and Labor.

STATEMENT OF THE CASE.

From the testimony taken in this case it appears that the appellant herein, TSURU TOMIMATSU, was lawfully married to one KOTARO TOMIMATSU, in the Empire of Japan sometime during the month of December, A. D. 1895, and thereafter cohabited together as husband and wife, there being born of the marriage four children in all, two of them born in Japan, and two in the Territory of Hawaii; it further appears that this couple came here from Japan some 11 years ago, and went to live at Lahaina, Maui, where their two children were born, and lived there some years, making that place their home; that some four or five years ago, the wife, the appellant in this case returned to Japan, with her children, for the purpose of making a short visit, the husband, Kotaro Tomimatsu, remaining here at their home in Lahaina, and has been here ever since, now being located at Puunene, Maui, and engaged in business as a cane contractor. It appears that the wife's purpose in going to Japan some four or five years ago was for the purpose of placing the children in a Japanese school, and that the schooling of the children took longer than she expected since she has overstayed the time she intended to spend in Japan. At any rate she now returns here to her home and husband, [59] and had there not been some trouble with the Doctors in Japan would have brought with her their children, it appears that they

will now follow by a later boat. The Husband has never left the Territory since he first came here.

The Board of Special Inquiry at the United States Immigration Station at this port has treated this appellant as an alien immigrant and denied her re-admission on her return to her home and domicile here, from which finding and decision the said TSURU TOMIMATSU has appealed to your Honor, and now filed this, her brief on appeal.

ARGUMENT.

No question is made in this case but that the appellant herein, Tsuru Tomimatsu, was lawfully admitted to the United States some 11 years ago, when she first came here with her husband, and no question is made but that her husband is lawfully in the United States; the appellant therefore does not come within the ruling in the case of *Ex parte Patterson*, 166 Fed. 536, where it appeared that the residence of the alien in the United States was during minority, her parents being in a foreign country, and that she never did in fact acquire a domicile here; neither does she come within the ruling in the case of *FUNARO vs. WATCHORN*, 164 Fed. 152, a New York case, where it appeared that the alien had not been lawfully admitted in the first place, and therefore could not acquire a domicile here. The contrary is the case here, the appellant was lawfully admitted here some 11 years ago when she arrived with her husband, and together with her husband established their domicile here.

The real question, and the only question, at issue

in this case is whether this appellant is a returning domiciled alien. A domicile is that place in which a person has voluntarily fixed his abode, not for a mere special or temporary purpose, but with a present intention of making it his permanent home, 14 CYC. 833. [60] But the appellant in this case is a married woman who is not living separate and apart from her husband under any judicial decree of divorce or separation, nor has she been compelled to leave him because of brutal treatment, nor is there shown to be a partial or total incapacity on the part of the husband to acquire a domicile. Such being the case, the domicile of this appellant follows that of her husband.

“The law fixes the domicile of the wife by that of the husband and denies to her during cohabitation the power of acquiring a domicile of her own separate and apart from him.” 14 CYC. 846.

Atherton vs. Atherton, 181 U. S. 155.

Cheely vs. Clayton, 110 U. S. 701.

Chambers vs. Prince, 75 Fed. 176.

Burnham vs. Rangeley, 4 Fed. cases, 2176.

The query then comes, what is the domicile of the husband KOTARO TOMIMATSU? From the decision and finding of the Board of Special Inquiry in this case, it appears that they have dealt with this case on the assumption that KOTARO TOMIMATSU never established a domicile here, basing it, I presume, on the following two questions and answers: Record, page #4.

“Do you expect to remain permanently in Hawaii, or do you expect to go back to Japan sometime to live? A. I intend to go back to Japan, my native land, again.”

“Has that been your intention ever since you came to Hawaii? A. Yes, after we saved money enough it has been my hope to go back to Japan.”

And in this connection I desire to draw attention to the following: Record, page #4.

“Do you intend to bring all of your children to Hawaii? A. Yes.”

(Above quotations taken from the testimony of Kotaro Tomimatsu.)

The last question and answer show a present intention of making this Territory his permanent home, his home and his family's home. All that the two former questions and answers show are a floating intention to return to Japan, his domicile of origin at some indefinite period of time in the future, which is not [61] sufficient to enable him to retain his original domicile in Japan.

Domicile is not established by the proof of one or two facts.

“It depends not upon proving particular facts, but whether all the facts and circumstances taken together tending to show that a man has his home or domicile in one place overbalance all the like proofs tending to show it in another.”

Abington vs. North Bridgewater, 23 Pick. 170.

On the one hand, we have the establishment of a home here, a continuous residence here for 11 years,

the wife returning here after a temporary visit abroad, the bringing of the children in the very near future, the statement of the appellant that she expects to be here for 10 years longer at least, in fact the establishment of a permanent home and place of abode here, and on the other hand, we have a declaration on the part of KOTARO TOMIMATSU that there is a floating intention to return to Japan at some future indefinite period of time. But the authorities do not stop here; they go farther:

In *Johnson vs. Smith*, 43 Mo., at page 501, the Court said: "A man's domicile is where he has fixed his ordinary dwelling without a present intention of removal, and that domicile may be changed to another notwithstanding the party on his departure may cherish a secret purpose of returning at some indefinite time in the future. Nor does the intent at the time of removal necessarily decide anything since the party's intentions may change at a subsequent period. He may come to a different mind and fix his dwelling in another locality without any present purpose of leaving it and thus become domiciliated there notwithstanding his original purposes."

In *Preston vs. Culbertson*, 58 Calif., at page 210, the Court said: "That he intended at some indefinite time in the future to remove (return) to Poverty Hill in Jamestown precinct did not make the latter place his residence."

Plaintiff was born in New York, removed to New Jersey in 1868, resided there until his wife died in 1880, then took his children to Scotland. On return

to the United States located in New Jersey, lived there, boarding until 1884, when he went to St. Louis where he engaged as a contractor, entering into a partnership with the defendant. Then closed his business in New Jersey. After living in St. Louis 2 years he sued in the Federal Court for a dissolution of the partnership, alleging that he was a citizen of New [62] Jersey, testifying that his residence in Missouri was merely temporary and it was not his purpose to give up his residence in New Jersey; HELD, that the facts set out did establish residence in Missouri, and that they were not overcome by a secret purpose to return to New Jersey when his business in Missouri was cleaned up, at some indefinite future period. Plea to jurisdiction sustained and bill dismissed. *Wright vs. Schneider*, 32 Fed. 705.

“The place to which a person has removed with the intent to remain there an indefinite time and has his place of present domicile is his place of domicile although he may entertain a floating intention to return at some future period.”
Harris vs. Firth, 11 Fed. Cases #6120.

A citizen of Massachusetts removed with his family to another State retaining no dwelling place in Massachusetts, though retaining his place of business here and intending to retain his domicile here and to return here at some future indefinite period of time, has NO DOMICILE IN MASSACHUSETTS:

Holmes vs. Greene, 75 Mass. 299, and at page 300-301, the Court said in part:

“It is true that in cases where the domicile of a party is in issue evidence of his intend may

have an important and decisive bearing on the question, but it must be in connection with other facts to which the intent of the party gives efficacy and significance. Such is the case where a person has two dwelling-houses in different towns in each of which he lives with his family an equal portion of the year. *Harvard College vs. Gore*, 5 Pick. 370. So, too, where a person leaves the country to be absent for purposes of business or pleasure for an indefinite period retaining his house and furniture in the place of his previous residence. *Sears vs. Boston*, 1 Met. 250. But no case can be found where the domicile of party has been made to depend on a bald intent unaided by other proof. The *factum* and *animus* must concur in order to establish domicile. *Harvard College vs. Gore*, 5 Pick. 570. The latter may be inferred from proof of the former, but evidence of a mere intent cannot establish the fact of domicile.

One who is absent from and resides out of the commonwealth retaining no dwelling-house or boarding place here, though intending to return at some future indefinite time, has no domicile here.

Sleeper vs. Paige, 81 Mass. 349.

If a person has actually removed to another place with the intention of remaining there an indefinite time and has a place of fixed domicile that place is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period.

Anderson vs. Anderson, 42 Vt. 350.

Fram vs. Thorman, 102 Wisc. 653.

From these authorities there can be no question but that the husband Kotaro Tomimatsu, who came here 11 years ago, is still living here, and whose further stay here is indefinite and who has a place of fixed domicile at Puunene, Maui,—is domiciliated here, and it being established by unbroken authority that the domicile of the wife follows that of the husband in a case such as this [63] one, the domicile of the wife therefore is in the Territory of Hawaii. The major question being disposed of and it having been shown that this woman, the appellant herein, is a returning domiciled alien, is she amenable to the United States Immigration Laws on her return here from a visit abroad? I believe, that under the following authorities she is clearly, and beyond a doubt, entitled to a landing on her return here:

Rogers vs. United States, 152 Fed. 346.

In re Buchsbaum, 141 Fed. 221.

United States vs. Aultman, 143 Fed. 922.

In re Panzara, 51 Fed. 275.

In re Martorelli, 63 Fed. 437.

In re Maiola, 67 Fed. 114.

United States vs. Sandrey, 48 Fed. 550.

In re Ota, 96 Fed. 487.

United States vs. Burke, 99 Fed. 895.

In re Di Simmons, 108 Fed. 942.

Mofitt vs. United States, 128 Fed. 375.

United States vs. Nakashima, 160 Fed. 843.

The latter case, United States vs. Nakashima, arose in this jurisdiction, and was decided both in the Dis-

trict Court here, and in the Circuit Court of Appeals of the Ninth Circuit, in favor of the returning domiciled alien, and against the United States, and settles the law in this jurisdiction. Under the law as laid down in the Nakashima case, this appellant is clearly and beyond a doubt entitled to a landing here now on her return.

It may be further noted that the Department by its own rules has recognized and follows the case of *U. S. vs. Nakashima*, 160 Fed. 843, statistical rule VIII, providing:

“Alien residents and aliens residing abroad coming to the United States for a temporary trip, shall be classed as non-immigrant aliens.

. . . ”

It having been shown that the appellant here established a domicile in the United States, and was a domiciled alien in 1907 when she left this country for a temporary visit to Japan, intending to return here again to her husband, that it is her intention to bring all of her children here to live with herself and her [64] husband, and it having been further shown that the domicile of the husband of appellant has been in the United States for and during the last 11 years and still continues, and even though the appellant in fact intended to abandon her domicile here by her return to Japan in 1907 (and I submit there was no abandonment by this act), she did not have the power to do so; her domicile following that of her husband, and under the authorities cited, even though the appellant and her husband Kotaro intend at some indefinite future period to return to Japan,

such bald intent is not sufficient to defeat the domicile here, established by their past acts, and continued by their present contemplated acts.

I submit, therefore, that beyond all question the appellant is a returning domiciled and non-immigrant alien, and as such entitled to a landing.

Respectfully submitted,

TSURU TOMIMATSU,

By GEO. S. CURRY,

Her Attorney.

Dated at Honolulu, Hawaii, June 25, 1912.

[Endorsed]: No. 46. (Title of Court and Cause.)
Return of Richard L. Halsey to Writ of Habeas Corpus. Filed Sept. 18, 1912. A. E. Murphy, Clerk.
By (Sgd.) F. L. Davis, Deputy Clerk. [65]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

In the Matter of the Petition of TSURU TOMIMATSU for a Writ of Habeas Corpus.

Demurrer.

And now comes the above-named petitioner, Tsuru Tomimatsu, by her attorney, Geo. S. Curry, and says that the return of Richard L. Halsey to the writ of habeas corpus issued herein, and the matters and things therein contained and set forth, in manner and form as the same are pleaded and set forth in said return, are not sufficient in law to discharge the writ of habeas corpus herein.

WHEREFORE PETITIONER PRAYS that the writ of habeas corpus heretofore issued herein be

sustained and that petitioner be discharged.

TSURU TOMIMATSU,

Said Petitioner.

By (Sgd.) GEO. S. CURRY,

Her Attorney.

Dated, Honolulu, Hawaii, September 17, 1912.

[Endorsed]: No. 46. (Title of Court and Cause.)
Demurrer to Return. Dated, Honolulu, Hawaii,
September 18, 1912. Filed September 18th, 1912.
A. E. Murphy, Clerk. By (Sgd.) F. L. Davis,
Deputy Clerk. [66]

Order Allowing Appeal (Minute).

From the Minutes of the United States District
Court, Vol. 8, Page 270, Saturday, September 28,
1912.

[Title of Court and Cause.]

On this day came Mr. Geo. S. Curry, counsel for
the above petitioner, and Mr. R. W. Breckons, United
States Attorney, who appeared on behalf of the re-
spondent herein, Richard L. Halsey, and this cause
was called for hearing on petition for appeal. There-
after due hearing having been had on said Petition,
the Court signed an order allowing said appeal to the
Ninth Circuit Court of Appeals. [67]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Application of TSURU TOMI-
MATSU for a Writ of Habeas Corpus.

Petition for Appeal.

To the Honorable SANFORD B. DOLE, Judge of
the Above-entitled Court:

THE UNITED STATES OF AMERICA, by its attorney, ROBERT W. BRECKONS, conceiving itself aggrieved by the order and judgment made and entered on the 17th day of September, A. D. 1912, in the above-entitled proceeding, does hereby appeal from the said order and judgment to the Circuit Court of Appeals for the Ninth Circuit, and files herewith its assignment of errors intended to be urged upon appeal, and it prays that its appeal may be allowed, and that a transcript of the record of all proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit of the United States.

Dated this 28th day of September, A. D. 1912.

(Sgd.) ROBT. W. BRECKONS,

United States Attorney.

Received a copy of the above petition.

TSURU TOMIMATSU.

By (Sgd.) GEO. S. CURRY,

Her Attorney. [68]

[Endorsed]: No. 46. (Title of Court and Cause.)
Petition for Appeal. Filed Sep. 28, 1912. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [69]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Application of TSURU TOMI-
MATSU for a Writ of Habeas Corpus.

Order Allowing Appeal.

Upon application and motion of ROBERT W. BRECKONS, United States Attorney for the Territory of Hawaii:

IT IS HEREBY ORDERED that the petition for appeal heretofore filed herein by the United States of America be, and the same is hereby granted; and that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final order and judgment heretofore, on September 17th, 1912, filed and entered herein, be and the same is hereby allowed, and that a transcript of the record of all proceedings and papers upon which said final order and judgment was made, duly certified and authenticated, be transmitted, under the hand and seal of the Clerk of this Court, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, at San Francisco, in the State of California.

Dated this 28th day of September, A. D. 1912.

(Sgd.) S. B. DOLE,
Judge U. S. District Court.

Received a copy of the above order.

TSURU TOMIMATSU.

By Her Attorney,
(Sgd.) GEO. S. CURRY.

[Endorsed]: No. 46. (Title of Court and Cause.)
Order Allowing Appeal. Filed Sep. 28, 1912. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [70]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Application of TSURU TOMI-
MATSU for a Writ of Habeas Corpus.

Assignment of Errors.

And now comes the United States of America, by ROBERT W. BRECKONS, its attorney, and says that in the record and proceedings in the above-entitled matter there is a manifest error and that the final record and judgment, made and entered in said matter on the 17th day of September, A. D. 1912, is erroneous and against the just rights of the said United States, in this, to wit:

First. The above-entitled court erred in granting the application for the writ of habeas corpus herein.

Second. The court erred in holding that the provisions of the Act of Congress of February 20, A. D. 1907, "To regulate the immigration of aliens into the United States," as amended by the Act of March 26, A. D. 1910, applied only to aliens coming to the United States for the first time.

Third. The court erred in not holding that the aforesaid Act of February 20, A. D. 1907, as amended by the Act of March 26, A. D. 1910, did not apply to aliens formerly domiciled in the United States and later returning thereto.

Fourth. The court erred in holding that it had jurisdiction to issue a writ of habeas corpus in cases where the appropriate immigration officers had decided that an alien had left the United States of America without intention to return thereto. [71]

Fifth. The court erred in determining that it had jurisdiction to review the action of a Board of Special Inquiry, or of the Department of Commerce and Labor, in deciding whether or not TSURU TOMIMATSU was one of the classes referred to in the statutes of the United States relative to immigration.

Sixth. The court erred in holding that the question of whether or not an alien who had left the United States had done so with an intention of returning was a question of law and not of fact.

Seventh. The court erred in holding that the said TSURU TOMIMATSU should be discharged.

Eighth. The Court erred in making and entering the final order and judgment of September 17, 1912, in favor of said TSURU TOMIMATSU and against the United States upon the pleadings and record in the above-entitled matter.

Ninth. The court erred in making, rendering and entering said final order and judgment of September 17, 1912, in this, that said final order and judgment was and is contrary to law, and to the facts stated in the pleadings and record in the above-entitled matter.

Tenth. The court erred in other particulars, appearing upon the record.

Whereas, by the law of the land, the said application for a writ of habeas corpus should have been denied, and the said writ of habeas corpus should

have been discharged, and the said applicant and petitioner should have been remanded to be dealt with according to law.

And the aforesaid United States of America now prays that the order and judgment, of September 17, 1912, hereinabove mentioned may be reversed, annulled, and held for naught, and that it, said United States, may have such other and further relief as may be [72] proper in the premises.

Dated this 28th day of September, A. D. 1912.

(Sgd.) ROBT. W. BRECKONS,
United States Attorney.

Received a copy of the above assignment of errors.

TSURU TOMIMATSU,
By Her Attorney.
(Sgd.) GEO. S. CURRY.

[Endorsed]: No. 46. (Title of Court and Cause.)
Assignment of Errors. Filed Sep. 28, 1912. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [73]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Application of TSURU TOMI-
MATSU for a Writ of Habeas Corpus.

Citation on Appeal.

United States of America,—ss.

The President of the United States, to TSURU
TOMIMATSU, Greeting:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Appeals

for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal, filed in the Clerk's office of the United States District Court for the Territory of Hawaii, wherein the United States of America is appellant and you, TSURU TOMIMATSU, are appellee, to show cause, if any [74] there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 28th day of September, A. D. 1912, and of the Independence of the United States the one hundred and thirty-seventh.

S. B. DOLE,

Judge U. S. District Court, District of Hawaii.

[Seal]

Attest: A. E. MURPHY,

Clerk U. S. District Court.

By F. L. Davis,

Deputy Clerk.

Received a copy of the within citation.

TSURU TOMIMATSU.

By GEO. S. CURRY,

Her Attorney.

[Endorsed]: No. 46. (Title of Court and Cause.)
Citation on Appeal. Filed Sep. 28, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [75]

*In the United States District Court for the Territory
of Hawaii.*

In the Matter of the Application of TSURU TOMI-
MATSU for a Writ of Habeas Corpus.

Praeceptum for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Petition for a writ of habeas corpus; filed July 25, 1912.
2. Order to show cause; made July 26, 1912.
3. Return of Richard L. Halsey to order to show cause; filed July 31, 1912.
4. Order for issuance of writ, and decision thereon; made September 17, 1912.
5. Writ of habeas corpus, and return of service; filed September 17, 1912.
6. Return of Richard L. Halsey to writ of habeas corpus; filed September 18, 1912.
7. Demurrer of applicant; filed September 18, 1912.
8. Judgment discharging applicant; made September 18, 1912.
9. Petition for appeal; filed September 28, 1912.
10. Assignment of errors; filed September 28, 1912.
11. Order allowing appeal; filed September 28, 1912.

12. Citation; filed September 28, 1912.
13. All minute entries in above-entitled cause.
14. This praecipe. [76]

Said transcript to be prepared as required by law and the rules of this Court, and the rules of the United States Circuit of Appeals for the Ninth Circuit, and filed in the office of the Clerk of said Circuit of Appeals at San Francisco, before the 28th day of October, A. D. 1912.

THE UNITED STATES OF AMERICA.

By (Sgd.) ROBT. W. BRECKONS,
United States Attorney.

[Endorsed]: No. 46. (Title of Court and Cause.)
Praecipe for Transcript. Filed Sep. 30, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [77]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

No. 46.

In the Matter of the Petition of TSURU TOM-
IMATSU, for a Writ of Habeas Corpus.

United States of America,
District of Hawaii,—ss.

[Certificate of Clerk U. S. District Court to Record,
etc.]

I, A. E. Murphy, Clerk of the District Court of the United States for the Territory of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 78, inclusive, to be a true and complete transcript of the record and proceedings had in said

court in the matter of the Petition of Tsuru Tomimatsu for a writ of habeas corpus, as the same remains of record and on file in my office, and I further certify that I hereto annex the original citation on appeal and order extending time to transmit record on appeal in said cause.

I further certify that the cost of the foregoing transcript of record is \$20.70, and that said amount has been charged by me in my account against the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 31st day of October, A. D. 1912.

[Seal] A. E. MURPHY,
Clerk, United States District Court, Territory of
Hawaii. [78]

[Endorsed]: No. 2197. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Tsuru Tomimatsu, Appellee. In the Matter of the Petition of Tsuru Tomimatsu for a Writ of Habeas Corpus. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Filed November 8, 1912.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

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